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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 757

HELEN CORINNE SCALES TRICE, Executrix,
Petitioner,

vs.

COMMERCIAL UNION ASSURANCE COMPANY,
LTD., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

FYKE FARMER,
1111 American Trust Building,
Nashville, Tennessee 37201,
Attorney for Petitioner.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

FOREWORD.

Is there such a thing as good and justifiable **false** testimony—"lying" on the witness stand—that may be made the basis of the setting aside of the verdict of a jury which refused to believe the testimony of the witness?

The memorandum of the district court reported in **213 F. Supp. 675, 690-692,** may well become a precedent for such a doctrine if this Court does not rebuke and condemn the decision holding that the jury verdict was against the great weight of the evidence consisting of out-of-court statements of one witness and the corroboration of these statements by a witness who was "seriously discredited by the nature of his own testimony, and by his admitted hostility to Mrs. Trice . . .," the "implication of his testimony in the context of this case," in the opinion of the district judge, being that

> ". . . such lying as he may have been doing was designed to minimize his admission of complicity in arson rather than to assume a criminal accomplice's role which he did not play, and that his hostility to Mrs. Trice brought out partial truth, not fabrication."
>
> **211 F. Supp. 692.**

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HELEN CORINNE SCALES TRICE, Executrix,
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COMMERCIAL UNION ASSURANCE COMPANY,
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Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

Petitioner, Helen Corinne Scales Trice, Executrix under the Will of Joe W. Scales, Deceased, asks that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit rendered in this case on July 14, 1964. The opinion of that court is reported as **Helen Corinne Scales Trice, Executrix v.**

Commercial Union Assurance Company, Ltd., et al., 334 F. 2d 673. A copy of this opinion is appended hereto.

The district court delivered several opinions, two of which (a Memorandum filed Dec. 20, 1962 and a Supplemental Opinion filed Jan. 25, 1963) are reported under the style and name of **Thurman Smith, Trustee, et al. v. Insurance Company of North America, et al., 213 F. Supp. 675.** Inasmuch as these opinions take up 28 printed pages in the reports and nothing therein contained is pertinent to the first question presented and it would seem that the convenience of the Court on considering the second and third questions presented would be little subserved by a reprinting of these opinions, either as an appendix to this petition or separately, petitioner hopes that the Court will treat this petition as being in compliance with Rule 23 (i). If the Court, however, desires that the opinions in **213 F. Supp.** commencing at page 675 be printed and separately presented, petitioner offers to do so and prays that she be given a few days additional time for filing said printed opinions as a separate appendix to her petition.

GROUNDS ON WHICH JURISDICTION OF COURT IS INVOKED.

(i) The judgment of the Court of Appeals sought to be reviewed was dated July 14, 1964 and entered the same date. The time for filing a petition for writ of certiorari was extended by Associate Justice Potter Stewart to Dec. 14, 1964.

(ii) On petitioner's timely motion for an extension of time to file a petition to rehear, on August 14, 1964 the Court of Appeals extended the time for filing a petition to rehear to August 24, 1964. The petition to rehear was filed and was overruled by the Court of Appeals on September 3, 1964. (The date of the denial of the petition to

rehear is erroneously stated to be September 1, 1964 in the report of the case at **334 F. 2d 673.**)

(iii) The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

1. Was petitioner's appeal No. 15,285 from the portion of the order of the district court entered July 23, 1962 amending the judgment on the jury verdict entered May 25, 1962 by providing

> ". . . but the defendants shall be entitled to credit against this judgment for all sums paid Thurman Smith, individually or as trustee for the Union Bank of Pulaski, Tennessee, on the indebtedness constituting a lien on the property of the plaintiff's testator subject to the mortgage clauses of the defendants' policies"

proper, timely and necessary in order for petitioner to obtain appellate review of this portion of the judgment adverse to her; and was it error for the Court of Appeals to fail and refuse to pass on the questions raised by petitioner asserting:

> a) the lack of power and jurisdiction of the district court to amend the judgment on the jury verdict after the lapse of ten days on grounds not set up by the defendants in their motion for a judgment n. o. v. and alternately for a new trial, and
>
> b) absent any contract provision, statute or rule of law entitling the defendants to have the credit placed on the judgment was the action of the court in so ordering it erroneous **as a matter of law** and a violation of the Seventh Amendment forbidding that

> the fact of the amount of damages sustained by the insured should be otherwise re-examined by the court and judgment rendered for a different amount of damages than found by the jury?

2. Did the Court of Appeals fail to perform its duty of passing on the questions raised by petitioner in her appeal No. 15,345 asserting the lack of power and jurisdiction of the district court to grant a new trial and **errors of law** committed by the district court in applying standards for weighing evidence which were wrong as a matter of law.

3. Did the Court of Appeals err **as a matter of law** in holding that there was no abuse of discretion by the trial court in granting defendants' motion for a new trial because a review of the record revealed that

> "There was substantial evidence in the record to the effect that the insured had been guilty of fraud and false swearing in the proof of loss and that he participated in procuring of the burning of the subject property."

instead of declaring and holding that, since the jury were the exclusive judges of the credibility of the witnesses and the weight of their testimony, they had the right to disbelieve the testimony of the witnesses offered by the defendants and that if affirmatively appeared from the memorandum opinion of the district judge that, although he said that he found upon weighing the evidence that the great weight of the evidence was against the verdict, he based this upon his own views as to the credibility of the witnesses conceding that the plaintiff called rebuttal witnesses to rebut the testimony of R. C. Jones (who the trial judge conceded was seriously impeached on cross-examination) and the "out-of-court statements" of James Nelson who testified on the stand repudiating his "out-

of-court statements", and, therefore, the trial judge exceeded his powers and invaded the province of the jury in setting aside their verdict?

STATUTES AND RULE OF CIVIL PROCEDURE INVOLVED.

Title 28, U. S. C., Sec. 2107, provides:

"**Sec. 2107. Time for appeal to court of appeals.**

Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree."

* * * * * * *

Title 28, U. S. C., Sec. 1291, provides:

"**Sec. 1291. Final decisions of district courts.**

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . ."

* * * * * * *

Federal Rule of Civil Procedure 73 provides:

Appeal to a Court of Appeals.

"**(a) When and How Taken.** When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, . . . The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to

run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules; granting or denying a motion under Rule 52 (b); or granting or denying a motion under Rule 52 (b) to amend or make additional findings of fact whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59."

STATEMENT OF THE CASE.

This lawsuit was brought in the United States District Court for the Middle District of Tennessee, by petitioner's testator, Joe W. Scales, to collect the insurance on a feed mill known as Pulaski Mill & Elevator Company. The mill was damaged by fire on July 14, 1956. Joe W. Scales, the original plaintiff, was the owner of the Pulaski Mill & Elevator Company property and was the named insured in policies issued by seven insurance companies, the defendants-appellees below.

The insurance policies involved in the lawsuit provided a total coverage of $25,000.00 on the buildings and an additional coverage of $25,000.00 on machinery and equipment.

At the time of the fire loss, Thurman Smith and the Union Bank of Pulaski, Tennessee, were the holders of an indebtedness approximating $40,000.00, which was secured by a deed of trust on the mill property, machinery and equipment. These lien-holders joined as original co-plaintiffs in the suit, asserting rights under the standard mortgage clauses in the policies.

The plaintiff, Joe W. Scales, died during the pendency of the suit in the district court. The suit was revived in

the name of Helen Corinne Scales Trice, Executrix, the present petitioner.

Among other defenses, the insurance companies contended that the insured Joe W. Scales was barred from collecting the insurance by fraud, false swearing and wilful misrepresentation in the proof of loss and that he had procured the mill to be burned to collect the insurance and defraud the insurance companies. Each side sought to recover a statutory penalty from the other for bad faith in bringing the suit or in refusing to pay the loss.

The case was tried before a jury. After the completion of the evidence and before the submission to the jury, the defendant insurance companies got the mortgagee-plaintiffs out of the case by paying them $32,962.50, representing a payment of $25,000.00 under the building coverage and the machinery and equipment coverage, and $7,962.50 interest thereon. This settlement was without the approval or consent of petitioner.

The court submitted separate questions or issues to the jury. The jury answered that the decedent-insured did not procure the mill to be burned and was not guilty of fraud, false swearing and misrepresentation in the proof of loss. They returned a verdict in favor of petitioner for $25,000.00, the policy limits on the buildings, and $20,000.00 on the machinery and equipment clauses wherein the policy limits totalled $25,000.00. The claim of the plaintiff for a statutory penalty by reason of bad faith on account of the refusal to pay the loss was denied by the jury.

The above jury verdict was returned May 18, 1962. Judgment was entered upon the verdict on May 25, 1962, the notation on the clerk's docket being as follows:

5-25-62 Judgment hereby entered by oral order of the

> Court from the bench May 18, 1962, upon a special jury verdict in favor of the plaintiff, Helen Corrinne Scales Trice, executrix of the will of Joe W. Scales, deceased, and against the defendants, Commercial Union Assurance Company, Limited; American National Fire Insurance Company; North British and Mercantile Insurance Company, Limited; New Hampshire Fire Insurance Company; Citizens Insurance Company of New Jersey; Queen Insurance Company of America, and the Home Insurance Company, in the sum of $25,000.00 for damages to insured building items and in the sum of $20,000.00 for damages to insured machinery and equipment items. F. E. W., D. C."

On May 28, 1962 a judgment of dismissal of the claims of the mortgagee-plaintiffs in accordance with the settlement agreement before the submission of the case to the jury was entered. On the same date, the seven defendant insurance companies filed a motion for judgment notwithstanding the verdict or in the alternative for a new trial.

On June 4, 1962, plaintiff-petitioner filed a motion to have the judgment amended to include interest from the date the suit was brought. The defendants objected to the allowance of interest and asked the court to enter a judgment which would allocate by specific sums the liability of each defendant according to its proportional coverage and credit the defendants with the amount paid or to be paid to the mortgagees under the settlement agreement, and to tax the costs one-third against the plaintiff and two-thirds against the seven defendants against whom the verdict was rendered.[1]

---

[1] In the same suit petitioner had sued other companies to collect insurance on grain and contents and the jury returned a verdict against her on these policies and assessed a penalty against her for bad faith in bringing the suit. Petitioner paid this judgment.

The defendants asked for such judgment instead of bringing their motions for judgment n. o. v. and alternate motion for a new trial up for hearing and determination by the court.

On July 23, 1962 the following notation was made on the clerk's docket:

7-23-62 *Order entered by Judge Frank Gray, Jr., ordering that the judgment entered May 25, 1962, in favor of the United States Fidelity and Guaranty Company and the Insurance Company of North America be, and it is hereby, approved, and the judgment in favor of Helen Corinne Scales Trice, executrix of the will of Joe W. Scales, deceased, be and it is hereby, amended to read as follows:

"Judgment is hereby entered as of May 25, 1962, that the plaintiff, Helen Corinne Scales Trice, executrix of the will of Joe W. Scales, deceased, have and recover of the defendants, Commercial Union Assurance Company, Limited; American National Fire Insurance Company; North British and Mercantile Insurance Company, Limited; New Hampshire Fire Insurance Company; Citizens Insurance Company of New Jersey; Queen Insurance Company of America, and the Home Insurance Company, the sum of $45,000.00 together with interest thereon from June 19, 1957, in the sum of $13,320.00, making a total sum of $58,320.00, but the defendants shall be entitled to credit against this judgment for all sums paid Thurman Smith, individually or as trustee for the Union Bank of Pulaski, Tennessee, or to the Union Bank of Pulaski, Tennessee, on the indebtedness constituting a lien on the property of the plaintiff's testator subject to the mortgage clauses of the defendants' policies. The costs shall be taxed one-fifth against the plaintiff, Helen Corinne Scales Trice, and four-

> fifths against the above-named defendants." (Attested copy mailed all counsel of record in this action.)

On July 30, 1962, the defendant insurance companies filed a motion pursuant to Rule 59 (e) to amend the judgment entered on July 23, 1962 by disallowing all interest from the time of the filing of the suit to date.[2]

On August 2, 1962, plaintiff-petitioner filed a motion to alter the judgment entered on July 23, 1962 by vacating that portion giving the defendants credit for the sum paid the mortgagees in settlement.

On October 8, 1962, the court entered an order overruling the motions of both the defendants and the plaintiff to amend the judgment entered July 23, 1962.

On November 7, 1962, the thirtieth day after the entry of the order on October 8, 1962, plaintiff (petitioner) filed notice of her appeal from that part of the judgment and order entered July 23, 1962, amending the judgment entered on May 25, 1962 on the jury verdict against the defendants by providing

> ". . . but the defendants shall be entitled to credit against this judgment for all sums paid to Thurman Smith, individually or as trustee for The Union Bank of Pulaski, Tennessee, on the indebtedness constituting a lien on the property of plaintiff's testator subject to the mortgage clauses of the defendants' policies."

---

[2] The motion contained the following paragraph:

"The Defendants herein having previously, on May 28, 1963, filed a motion for a new trial subsequent to the docket entry of the Clerk pursuant to the verdict of the jury, these Defendants not waiving any rights resulting from said filing of said motion but expressly relying thereon to the hearing here and now reaffirm and reiterate said motion previously filed May 28, 1962, and incorporate herein by reference as fully and completely as though the same were copied fully herein."

ARGUMENT.

The judicial function in this case was performed in stages in an unusual way, i. e.:

First, on May 25, 1962, annotation of judgment by oral order of the court from the bench on May 18, 1962 on the jury verdict in favor of the plaintiff against the seven insurance companies for $25,000.00 damages to insured building items and in the sum of $20,000.00 for damages to insured machinery and equipment was made by the clerk of the court.

Secondly, the judgment was amended by order entered on July 23, 1962 allowing interest on plaintiff's timely motion to amend judgment but crediting the total amount of the judgment, $58,320.00, in compliance with the request of the defendant insurance co. nies **without timely motion to amend,** with the amount of sums paid mortgagees and taxing costs; and after plaintiff had appealed from the portion of the order amending the judgment by giving the defendants the credit which they asked for,

Thirdly, by setting aside the jury verdict and the judgment thereon and the granting of a judgment n. o. v. for the defendants against the plaintiff for $6,250.00 for a penalty for bad faith in bringing the suit and, if the judgment n. o. v. should be reversed on appeal, a new trial.

Question No. 1.

Was petitioner's appeal No. 15,285 from the portion of the order of the district court entered July 23, 1962 amending the judgment on the jury verdict entered on May 25, 1962 by providing

> ". . . but the defendants shall be entitled to credit against this judgment for all sums paid Thurman Smith, individually or as trustee for the Union Bank

of Pulaski, Tennessee, on the indebtedness constituting a lien on the property of the plaintiff's testator subject to the mortgage clauses of the defendants' policies"

proper, timely and necessary in order for petitioner to obtain appellate review of this portion of the judgment adverse to her; and was it error for the Court of Appeals to fail and refuse to pass on the questions raised by petitioner asserting:

a) the lack of power and jurisdiction of the district court to amend the judgment on the jury verdict after the lapse of 10 days on grounds not set up by the defendants in their motion for a judgment n. o. v. and alternately for a new trial, and

b) absent any contract provision, statute or rule of law entitling the defendants to have the credit placed on the judgment was the action of the court in so ordering it erroneous **as a matter of law** and a violation of the Seventh Amendment forbidding that the fact of the amount of damages sustained by the insured should be otherwise re-examined by the court and judgment rendered for a different amount of damages than found by the jury?

Points and propositions of law relied on by petitioner.

A. **The judgment entered July 23, 1962 was the final judgment.**

The judgment was for money and, in the language of Mr. Justice Whitaker's opinion in **United States v. Schaefer Brewing Company, 356 U. S. 227, 2 L. ed. 2d 721, 78 S. Ct. 674,** "embodies the essential elements of a judgment for money and clearly evidences the judge's intention that it shall be his final act in the case." Petitioner quotes further from the opinion of the Court in the above case:

"If it does so, it constitutes his final judgment and, under Rule 58, it 'directs that a party recover (a sum of) money,' and 'upon receipt by (the clerk) of the (opinion),' requires him to 'enter judgment forthwith' against the party found liable for the amount awarded, which is to be done by making a brief 'notation of (the) judgment in the civil docket (showing the substance of the judgment of the court) as provided by Rule 79 (a).' When all of these elements clearly appear final judgment has been both pronounced and entered, and the time to appeal starts to run under the provisions of Rule 73 (a). And, as correctly held by the Court of Appeals, the later filing and entry of a more formal judgment could not constitute a second final judgment in the case nor extend the time to appeal. 236 F. 2d at 892."

The judgment in the case at bar was noted on the clerk's docket. No further judicial act was required before the clerk of the court was authorized to issue execution. It was not necessary that the judgment expressly direct execution to issue. **Federal Rule of Civil Procedure 62 (a); also Rule 69, Tenn. Code Anno. 26-120, providing that the clerk shall issue to the plaintiff, his agent or attorney, on demand, an execution on any judgment or decree to which the plaintiff is entitled.**

The ascertainment of the amount of the credit was a ministerial act which could be performed by the clerk, since the agreement between the insurance companies and the mortgagees has filed in the case and noted on the clerk's docket.

The judge in the judgment entered July 23, 1962, made no reservation of the right to pass on the defendants' motion for a judgment n. o. v. and alternately a new trial previously filed. It would be most extraordinary, if he had the intention to consider the motion of the defendants and decide whether to set the jury verdict aside and

award a new trial, for him to decide plaintiff's motion to increase the judgment by adding interest and grant defendants' request that they receive a credit against the judgment before deciding whether the judgment was to stand or not.

In determining whether or not the judgment evidenced an intention to make reservation of the power to pass on the defendants' motion for judgment n. o. v. and alternately for a new trial at a later date, obviously what the judge actually did at a later date is not material.

Clearly the judgment of July 23, 1962 was the final judgment in the case and the time for an appeal from it started running under Rule 73 (a) on the date of its entry unless the statute was tolled by the pendency of defendants' undetermined motion filed prior to its entry. Was the **plaintiff's** statutory time for an appeal from a portion of a judgment adverse to him suspended by a timely motion of the **defendant** made pursuant to the rules as provided by Rule 73 (a)? On principle and authority the answer to that question is "no."

In the case at bar, if the plaintiff had not appealed from the portion of the judgment giving the defendants the credit against the judgment and the defendants had withdrawn their motion after the appeal time had run, plaintiff would unquestionably have lost the right to obtain appellate review of the judgment. Nor has it been settled that petitioner could have appealed from a subsequent order overruling defendants' motion for judgment n. o. v. and for a new trial.[3]

---

[3] Cf. *Hill v. Chicago and Evanston Ry. Co. et al.*, 140 U. S. 52, 11 S. Ct. 690, 35 L. ed. 331, in which this Court declared: "The decree of June 8, 1885, was appealable as to the matters which it fully determined; so also was the decree of July 14, 1887, as to the severable matter which it involved. . . . But the time to appeal from the first decree elapsed; and no question being raised as to the second decree, that of July 14, 1887, it must be affirmed, and it is so ordered."

The only decision squarely in point on the question that petitioner has found is one by the Court of Appeals for the Ninth Circuit holding that where defendants did not join in co-defendant's motions for a new trial and appealed more than three months after the entry of judgments against them but within three months after the denial of motions for new trial, their appeal was too late and must be dismissed. (This case arose before the change of the time for appeal to 30 days.) The Court of Appeals for the Ninth Circuit in **Continental Casualty Co. v. U. S., 167 F. 2d 107, cer. den. 337 U. S. 940, 69 S. Ct. 1517, 93 L. ed. 1745, reh. den. 338 U. S. 840, 70 S. Ct. 35, 99 L. ed. 514,** declared:

> "The Continental Casualty Company and Goerig and Philip moved for a new trial. The three Macris did not join in the motion. The motions for a new trial were denied on May 20, 1947. The Continental Casualty Company and Goerig and Philip appealed within three months after May 1, 1947. The Macris delayed their appeal until August 18, 1947, more than three months after the entry of the judgments against them, but within three months after the denials of the motions for new trial, in which they did not join.
>
> "Schaefer, for whom the United States sues, but not the United States the use plaintiff, moves to dismiss the Macris' appeal on the ground of absence of jurisdiction. There is no motion on behalf of others having judgment. However, since the question is one of jurisdiction, we must proceed to consider it, even though there may be no moving party.
>
> "As to the judgments against the three Macris on their cross complaints, it is apparent their appeal must be dismissed. They made no motion for a new trial as to these judgments, and that of Goerig and Philip was of adversary parties and could not be construed as on behalf of the Macris. So also of the judgment

for the United States on the second count against the Macris alone. The statute was not tolled as to it."

B. The Court of Appeals cited cases for the proposition that an untimely appeal does not divest the trial court of jurisdiction to proceed to final judgment. Thus, the opinion begs the question. For, if the judgment of July 23, 1962 was the final judgment, unquestionably the appeal therefrom by petitioner divested the trial court of jurisdiction to grant the judgment n. o. v. and the alternate new trial. **5 Moore's Fed. Practice, par. 52.11 (2); Barron and Holtzoff, Fed. Pr. and Proc., Vol. 3A, Sec. 1558.** Cases applying the rule are well-nigh numberless.

Therefore, petitioner in case No. 15,286, insisted that the district court, after the appeal taken by her on Nov. 7, 1962 from the final judgment, was without power or jurisdiction to set aside the jury verdict and enter a judgment n. o. v. and grant an alternate new trial.

C. The Court of Appeals said that all issues raised by the appeals in Dockets Nos. 15,285 and 15,286 were likewise asserted in Docket No. 15,345, but considered none of them and even refused to pass on all the issues raised by petitioner in her appeal No. 15,345. Petitioner says that the Court of Appeals did not do its duty to pass on the questions raised in her appeals.

Questions Nos. 2 and 3.

2. Did the Court of Appeals fail to perform its duty of passing on the questions raised by petitioner in her appeal No. 15,345 asserting the lack of power and jurisdiction of the district court to grant a new trial and **errors of law** committed by the district court in applying standards for weighing evidence which were wrong as a matter of law.

3. Did the Court of Appeals err **as a matter of law** in holding that there was no abuse of discretion by the trial

court in granting defendants' motion for a new trial because a review of the record revealed that

> "There was substantial evidence in the record to the effect that the insured had been guilty of fraud and false swearing in the proof of loss and that he participated in procuring of the burning of the subject property."

instead of declaring and holding that, since the jury were the exclusive judges of the credibility of the witnesses and the weight of their testimony, they had the right to disbelieve the testimony of the witnesses offered by the defendants and that it affirmatively appeared from the memorandum opinion of the district judge that, although he said that he found upon weighing the evidence that the great weight of the evidence was against the verdict, he based this upon his own views as to the credibility of the witnesses conceding that the plaintiff called rebuttal witnesses to rebut the testimony of R. C. Jones (who the trial judge conceded was seriously impeached on cross-examination), and the "out-of-court statements" of James Nelson, who testified on the stand repudiating his "out-of-court statements", and, therefore, the trial judge exceeded his powers and invaded the province of the jury in setting aside their verdict.

The applicable rules of law declared by this court and how they were disregarded by district court.

The law.

" . . .; the verdict negatives the notion of fraud. There was conflicting evidence; the weight to be given this was for them to determine."

Soler & Co. v. United Firemen's Ins. Co., 299 U.

Excerpts from memorandum of district court setting aside verdict of jury.

"There was enough conflicting evidence on the arson issue to preclude a directed verdict on that ground . . . (p. 638).

. . . . . .

S. 45, 50, 57 S. Ct. 54, 81 L. ed. 30.

. . . . . .

"The jury are the judges of the credibility of witnesses and of the weight to be given any testimony, and whether it establishes a controverted fact."

Headnote 7, **Aetna Life Ins. Co. of Hartford, Conn. v. Ward, 140 U. S. 76, 11 S. Ct. 720, 35 L. ed. 371.**

. . . . . .

"But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion."

Lavender v. Kurn, 327 U. S. 645, 653, 66 S. Ct. 232, 90 L. ed. 916.

. . . . . .

"This action for damages alleged to have been caused to the petitioner by the respondent's use in violation of the Safety Appliance Acts, of a railroad freight car not equipped with efficient hand brakes, presents the question whether the

". . . the findings also reflect the court's judgment on the credibility of witnesses to some extent . . .

"The jury could not have been so capricious as to believe Nelson's testimony on the stand, and it was precluded from accepting the reading of his prior deposition during his examination as substantive proof. Nelson's testimony, therefore, must be disregarded for present purposes. This does not mean, however, that the uncontradicted evidence of his prior confessions and denials must be disregarded . . . yet the circumstances under which his various out-of-court statements were made provide strong evidence from which to draw inferences as to the probability that he set the fire at Scales' request . . .

. . . . . .

"Considered together, all of Nelson's actions and statements prior to the trial are almost conclusive on reasonable minds that Nel-

evidence at the trial, with inferences that the jury justifiably could draw from it, was sufficient to support the verdict for the petitioner. We hold that it was . . .

"We believe that the evidence given at the trial, with the inferences that the jury justifiably could draw from it, was sufficient to support the verdict originally rendered for the petitioner. Accordingly the judgment of the Circuit Court of Appeals sustaining the judgment entered for the respondent by the District Court is hereby reversed."

Myers v. Reading Company, 331 U. S. 477, 67 S. Ct. 1334, 91 L. ed. 1615.

son took part in setting fire to the mill . . .

. . . . . .

"In rebuttal, the plaintiff offered an impressive array of undependable witnesses.

. . . . . .

"Even if the arson issue had to be decided only on the basis of Jones' testimony in court and Nelson's established out-of-court statements versus plaintiff's rebuttal witnesses, a jury verdict for the defendants would have been fully supported.

The applicable rules of law declared by this Court and how they were disregarded by Court of Appeals.

The law.

". . . where the evidence in a cause conduces to prove a fact in issue before a jury, it is competent in law to establish such a fact; a jury may infer any fact from such evidence which

Excerpts from opinion of Court of Appeals.

"The granting of a new trial upon the ground that the verdict is contrary to the weight of the evidence is a matter resting in the sound discretion of the

the law authorizes a court to infer on a demurrer to the evidence: after a verdict in favor of either party on the evidence, he has a right to demand of a court of error that they look to the evidence only, for only one purpose, and with the single eye to ascertain whether it was competent in law to authorize the jury to find the facts which make out the right of the party, on a part, or the whole of his case . . .

Hepburn v. Dubois, 12 Pet. 345, 9 L. ed. 1111.

. . . . . .

"Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because the judges feel that other results are more reasonable."

Tennant v. Peoria & Union R. Co., 321 U. S. 21, 64 S. Ct. 409, 88 L. ed. 520.

"The conflict in the testimony was resolved by the jury's verdict in favor of the petitioner. Since there Trial Judge and his action thereon is not reviewable upon appeal except upon a showing of a clear abuse of discretion.

. . . . . .

"A review of the record in this case reveals that there was no abuse of discretion by the Trial Court in granting the defendants' motion for a new trial. There was substantial evidence in the record to the effect that the insured had been guilty of fraud and false swearing in the proof of loss and that he had participated in procuring the burning of the subject property.

"Having concluded that the judgment notwithstanding the verdict should be set aside but that the Trial Court did not abuse its discretion in granting a new trial, it is not necessary to consider other issues raised in this appeal. . . ."

was an evidentiary basis for that verdict, it was error for the New York trial and appellate courts to re-evaluate the conflicting evidence and mandate a result opposite from that reached by the jury.

. . . . . .

"Since, in this case, petitioner's evidence, though disputed constituted probative facts sufficient to support the finding of negligence, the state courts improperly invaded the function and province of the jury in setting the verdict aside. Rogers v. Missouri Pacific R. Co., 352 U. S. 500, 1 L. ed. 2d 493, 77 S. Ct. 443."

Basham v. Pennsylvania R. Co., 372 U. S. 699, 83 S. Ct. 965, 10 L. ed. 80, 82.

The questions raised by petitioner which the Court of Appeals refused to pass on.

III.

Did the Lower Court Lack the Power and Jurisdiction to Grant a New Trial on the Issue of Fraud and False Swearing or Abuse Its Discretion by Doing So?

The Lower Court Answered This "No".

Appellant Contends This Should Be Answered "Yes".

For the following reasons, appellant contends that the trial court made reversible error in granting a new trial on the issue of fraud and false swearing:

1. The only specific ground for granting a new trial on this issue set forth in the defendant's motion for an alternative new trial was ground No. 12 complaining of the submission of the issue divided into four parts. The lower court, as appellant reads the Memorandum overruled this ground. Defendants have not appealed and are not in position to obtain review of the decision of the lower court on this ground on appellant's appeal. In any event, the submission was proper.

2. The court's power to grant a new trial on its own initiative ended 10 days after the entry of the judgment on May 25, 1962.

3. Since the theory of fraud based upon the overstatement of the size of the grain bins was not raised during the lifetime of Joe W. Scales—although defendants' adjuster had knowledge of the mistake and since Joe W. Scales on oral examination testified he did not know what grain was in the bins but vouched for the correctness of the proof of loss because of the confidence he had in his bookkeeper, Buford Hill, the defendants are barred by bad faith from attempting to obtain a new trial on the theory that Joe W. Scales misrepresented the size of the grain bins to deceive

the mill insurers lest they might discover, and the grain insurers through them, the "falsity of the claims against their co-defendants."

The **Tennessee Supreme Court in Tenn., etc., Ins Co. v. Horner, 198 Tenn. 445,** held that good faith on the part of an insurer requires that it point out details in which notice and proof of loss is insufficient and give insured opportunity to correct the defects and good faith does not permit the insurer to be silent and evasive under such circumstances. In **Teller v. Athens Stove Works, 7 F. R. D. 88,** the U. S. Dist. Court for the Eastern District of Tennessee, held that a litigant is not entitled to a new trial on the basis of a different theory predicated on the same facts. The theory advanced by the lower court in par. 10 of his memorandum at page 683 was not raised by the defendants but was asserted by the court for the first time when the Memorandum was filed.

4. The court in granting the new trial acted under the compulsion of mistakes of law in that:

a) The above theory of an intent to deceive the mill insurers amounts to building an inference upon another inference which may not be done.

b) The forfeiture clause of the policies, under the rule of strict construction required in Tennessee **(Ins. Co. v. Scales, 101 Tenn. 628),** related to the insured property only, and hence any representation or statement as to the value of other property not covered by the policies was immaterial. On the facts of this case, **Epperson v. Westchester Fire Ins. Co., 155 Tenn. 621, 299 S. W. 776,** furnished the rule of decision, and the court misinterpreted that case.

c) The court had no right to look to the jury verdict on the grain claims "to give color and meaning to the vast overstatement of the grain dimensions," since the jury

under instructions which were not excepted to by the defendants, necessarily found that the overstatement did not affect the policies of the companies insuring the mill so as to amount to fraud.

IV.

Was It Reversible Error for the Trial Court to Grant the Defendants' Alternative Motion for a New Trial on the Arson Issue?

The Lower Court Answered This "No".

Appellant Contends This Should Be Answered "Yes".

For the following reasons, appellant contends that the trial court made reversible error in granting the defendants' alternative motion for a new trial on the arson issue:

1. The defendants' motion filed within 10 days from the entry of the judgment conferred no authority upon the court to grant the motion because it failed to comply with Federal Rule of Civil Procedure 7 (b) in that it did not state with sufficient particularity any grounds therefor.

2. The court lacked the power to grant a new trial on its own initiative because this power ended 10 days after the entry of the judgment.

3. It affirmatively appears from the court's Memorandum that the new trial was granted solely because the court thought a different inference from conflicting evidence was more reasonable than the one the jury drew.

4. In finding a motive for arson on the part of Joe W. Scales the court inadvertently drew a conclusion wholly unwarranted and improper since it is contrary to reason and common sense said conclusion being expressed in these words:

> "2. Scales obtained title to this mill in a transaction with Lewis E. Hewgley for a consideration that was

the subject of rather evasive testimony by both Scales and Hewgley. The transaction occurred after Hewgley had operated the mill at a loss for several years, and Scales promptly reduced the operation to little more than a warehouse plus a private fee-grinding facility serving the cattle farms of himself and close associates. The plant was a special-purpose plant that could not easily be converted to other uses. The consideration as disclosed, with the outstanding mortgage indebtedness, implied a valuation of no more than $70,000.00 or $80,000.00 for the mill and the valuable industrial tract with long rail and highway frontages and it may well have been much less. The outstanding insurance on the buildings and equipment totaled $56,000.00. The valuations of the machinery, without considering any discount for transportation to a market, plus the replacement cost of the buildings exceeded this amount. The situation was clearly one in which arson could have been profitable'' (213 F. Supp., page 688).

The common experience is that men burn buildings to collect the insurance when they are **overinsured**, not when they are **underinsured.**

5. The court's Memorandum shows that he acted under the compulsion of a mistake of law since he stated:

> ''Even if the arson issue had to be decided only on the basis of Jones' testimony in court and Nelson's established out-of-court statements versus the plaintiff's rebuttal witnesses, a jury verdict for the defendants would have been fully supported."
>
> **213 F. Supp., page 692.**

Inasmuch as James Nelson on the witness stand testified that he did not burn the mill and the court elsewhere in his Memorandum found that Jones was impeached, saying:

"Jones, of course, was seriously discredited by the nature of his own testimony, and by his admitted hostility to Mrs. Trice, and by the obviously good reasons he had for that hostility. Nevertheless, the implication of his testimony in the context of this case is that such lying as he may have been doing was designed to minimize his admission of complicity in arson rather than to assume a criminal accomplice's role which he did not play, and that his hostility to Mrs. Trice brought out partial truth, not fabrication."

Although the lower court said that the verdict of the jury was contrary to the great preponderance of the evidence, it is not necessary for this Court to read the record and weigh the evidence independently to perceive that "out-of-court" statements of Nelson contrary to his testimony in court together with the testimony of such a man as R. C. Jones, even with all the circumstances enumerated in the Memorandum, could not constitute a great preponderance of the evidence as against the testimony of plaintiff's rebuttal witnesses.

6. The court lacked the power and jurisdiction to make the finding that appellant's counsel was guilty of giving perjured testimony, no particulars of this ground of the motion for the new trial having been set out in the motion filed within 10 days of the entry of the judgment and besides the court invaded the province of the jury whose duty it was to pass on the credibility of the witnesses.

For the above reasons, appellant says that the trial court abused its discretion in granting the alternative motion for a new trial. An authority sustaining appellant's position is the leading case of **Marshall's U. S. Auto Supply, Inc. v. Cashman (C. A. 10th), 111 F. 2d 140**, certiorari denied **311 U. S. 667, 61 S. Ct. 26, 95 L. ed. 426**, where the Court of Appeals for the Tenth Circuit said:

"The fourth and last ground was that the verdict was secured by false testimony offered by the defendant. What testimony? Coming from what source? Given by what witness or witnesses? False in what respect? The motion was completely silent. The evidence presented conflicts, but they were not extraordinary or substantially different from those frequently present in the trial of commonplace cases. Litigation would become interminable if trial courts shall take it upon themselves to set aside every verdict where the evidence is conflicting.

"It is manifest that on clear considerations the motion was inadequate and defective in essential respects and failed to meet recognized requirements for such pleadings. The granting of it exceeded the exercise of sound judicial discretion; it constituted an abuse of discretion.

"Stress is laid upon the point that a new trial was granted on the additional ground that the court was not satisfied with the verdict. But that was wholly ineffective for in that respect the court acted on its own initiative, and Rule 59 (d), supra, limits the time within which a court may order a new trial on its own initiative to ten days from the entry of the judgment. That time has long since expired, and the seasonable serving of the motion did not operate to extend the time within which the court could not act on its own initiative. It follows that at the time the order was entered the court was without power to order a new trial otherwise than on the motion.

"Other questions are discussed but they grow out of the second trial, and the conclusion which we have reached in respect of the action of the court in setting aside the first verdict and allowing a new trial renders it unnecessary to consider them.

"The judgment is reversed with costs, the order setting aside the verdict for defendants and granting

a new trial is vacated, the verdict for defendant is reinstated, and the cause is remanded with directions to enter judgment for defendant on such verdict."

National Farmers Union Auto. & Cas. Co. v. Wood, 207 F. 2d 659 (C. A. 10th), follows the above rule, holding that even though motion for new trial is lodged within 10 days after entry of judgment, granting of new trial on ground not mentioned in motion is to be treated as action by court on its own initiative.

It is the contention of the plaintiff that the trial court was without power or jurisdiction in the case at bar to grant a new trial because it disapproved the jury's verdict or upon the ground stated in No. 14 of defendant's motion, viz., "The competent and credible evidence showed that Joe W. Scales procured the burning of the Pulaski Mill and Elevator Company property," etc.

REASONS RELIED ON FOR GRANTING THE WRIT.

Petitioner says that the Court of Appeals by its affirmance of the judgment of the District Court setting aside the jury verdict and granting a new trial to the defendants after final judgment had been entered in favor of petitioner on the jury verdict and adding interest to which petitioner was entitled as a matter of law rendered a decision that is in conflict with:

(a) Applicable decisions of this Court;

(b) That it has decided an important question arising under the Rules of Civil Procedure adopted by this Court to govern the practice in the district courts which has not been, but should be, settled by this Court; and

(c) That it has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

PRAYER.

Wherefore, petitioner, prays that a writ of certiorari issue from this Honorable Court; and that the judgment of the Court of Appeals be reversed insofar as it affirms the judgment of the district court setting aside the jury verdict and granting a new trial to the defendants, or in the alternative that the Court of Appeals be directed, on remand of the case, to pass on the questions raised by petitioner concerning the judgment of the district court in setting aside the jury verdict and awarding the defendants a new trial and the questions raised by petitioner on her first appeal from the July 23, 1962 order giving the defendants a credit on the judgment on the jury verdict for the amount paid to the mortgagees.

This December 14, 1964.

.....

FYKE FARMER,
1111 American Trust Building,
Nashville, Tennessee 37201,
Attorney for Petitioner.

APPENDIX.

Nos. 15285-86 and 15345.

United States Court of Appeals
For the Sixth Circuit.

Helen Corrinne Scales Trice, Executrix,
Plaintiff-Appellant,
v.
Commercial Union Assurance Company, Ltd., et al.,
Respondents-Appellees.

Appeal from the District Court of the United States for the Middle District of Tennessee.

Decided July 14, 1964.

Before: O'Sullivan, Circuit Judge, and Boyd and Wilson, District Judges.

Wilson, District Judge. These three consolidated appeals involve in single lawsuit brought to collect fire insurance upon a feed mill known as the Pulaski Mill & Elevator Company. The mill was damaged by fire upon July 14, 1956. Joe W. Scales, the original plaintiff, was the owner of the Pulaski Mill & Elevator Company property and was the named insured upon policies issued by the seven insurance companies who are defendants herein.[1]

---

[1] The seven defendants who are appellees here are Commercial Union Assurance Company, Ltd., American National Fire Insurance Company, North British & Mercantile Insurance Company, Ltd., New Hampshire Fire Insurance Company, Citizens Insurance Company of New Jersey, Queen Insurance Company of America, and The Home Insurance Company. The case was tried and submitted jointly as to these seven defendants.

The subject insurance policies provided a total coverage of $25,000.00 upon the building and an additional coverage of $25,000.00 upon the machinery and equipment.

At the time of the fire loss, Thurman Smith and the Union Bank of Pulaski, Tennessee, were the holders of an indebtedness approximating $40,000.00, which was secured by a trust deed upon the mill property, machinery and equipment. These lien-holders joined as original co-plaintiffs in the suit, asserting rights under the standard mortgage clauses in the subject policies. In addition to the seven insurance company defendants involved in this appeal, the original suit by the plaintiff, Joe W. Scales, joined two other insurance carriers, seeking recovery for the loss of grain alleged to have been stored in the mill at the time of the fire. The plaintiff, Joe W. Scales, died during the pendency of the suit, and the suit was revived in the name of his executrix, Helen Corinne Scales Trice, who is the appellant herein.

Among other matters asserted in defense of the suit, the defendants below contended that Scales had been guilty of procuring the burning of the said mill and had been guilty of fraud, false swearing and wilful misrepresentation in submitting a proof of loss on the fire in which it is contended he misrepresented the size of the grain storage bins and the quantity of grain lost in the fire. Each side sought to recover of the other a statutory penalty for the other having allegedly exercised bad faith in the bringing of the suit or in the defending of the suit (56-1105 & 56-1106 T. C. A.). The case was tried before a jury. Shortly before completion of the trial and submission of the case to the jury, a settlement was effected between the mortgagee plaintiffs and the seven defendants, in which settlement a total of $32,962.50 was paid to the mortgagees under the building coverage and machine coverage policies, representing a payment on principal of $25,000.00 and a payment on interest of $7,962.50.

A judgment of dismissal was thereafter entered as to the mortgagees' lawsuit. The plaintiff, Helen Corinne Scales Trice, was not in any way a party to the settlement between the defendants and the mortgage holders, and the trial of her case was continued with the case being submitted to the jury upon special issues. The jury found that Scales had practiced fraud in the proof of loss submitted with reference to the grain and contents policies, but had not procured the burning of the feed mill property and had not been guilty of fraud with reference to the building policies or the machinery and equipment policies. The jury further found that Scales had acted in bad faith in bringing the lawsuit against the two defendants upon the grain and contents policies, and awarded these defendants a judgment of $3,000.00. The jury further found that the plaintiff was entitled to recover of the remaining seven defendants the sum of $25,000.00, the policy limits, upon the building policies and $20,000.00 upon the machinery and equipment policies, wherein the policy limits totalled $25,000.00. The claim of the plaintiff for a statutory penalty by reason of bad faith refusal of the defendants to pay the plaintiff's insurance claims was denied by the jury.

The above jury verdict was returned upon May 18, 1962, and upon May 25, 1962, the clerk entered a judgment thereon, awarding a judgment in favor of the plaintiff, Mrs. Trice, and against the seven defendants who were the building and equipment insurance carriers in the sum of $25,000.00 for damages to the insured building and for $20,000.00 for damages to the insured machinery and equipment, and awarding a judgment in favor of the two defendants who were grain insurance carriers and against the plaintiff, Mrs. Trice, in the sum of $2,000.00.

As noted above, a judgment of dismissal was entered as to the claims of the mortgagee plaintiffs upon an agreed settlement, this judgment of dismissal being entered

under date of May 28, 1962. The plaintiff, Mrs. Trice, so the record reflects, has paid the $3,000.00 judgment in favor of the two grain insurance carriers, so that this suit remains pending only as between the plaintiff, Mrs. Trice, and the seven defendants who have the building and equipment coverage.

The issues raised upon these three appeals involve not only matters that transpired at the trial of the case prior to the entry of the judgment upon May 25, 1962, but also matters that arose in subsequent proceedings before the trial court. It is therefore necessary to recount the events in the record subsequent to the entry of the judgment upon May 25, 1962.

Upon May 28, 1962, a motion for judgment notwithstanding the verdict or in the alternate for a new trial was filed upon behalf of the seven defendants involved in this appeal. Upon June 4, 1962, a motion was filed by the plaintiff seeking to have the judgment amended to include interest from the date this suit was filed. Upon July 23, 1962, the Court entered an order amending the judgment of May 25, 1962, so as to allow the plaintiff interest from the date of the filing of the suit, but also allowed the defendants credit for payments made to the mortgagees to the extent the mortgage lien was reduced thereby. Within ten days after the order of July 23, 1962, the defendants renewed their motion for judgment notwithstanding the verdict and for new trial. Each party also filed motions with respect to the order of July 23, 1962, and upon October 8, 1962, the Court overruled the plaintiff's motion to vacate that portion of the order crediting the defendants with the sums paid the mortgagees and overruled the defendants' motions to disallow interest on the judgment, but expressly reserved any action upon the defendants' motions for judgment notwithstanding the verdict or new trial. The plaintiff then on November 7, 1962, filed notice of appeal from those

portions of the order of July 23, 1962, and October 8, 1962, allowing the defendants credit for payments made to the mortgagees. This notice of appeal constitutes the basis of the appeal in Docket No. 15285.

Upon December 20, 1962, the Court entered a further order setting aside the jury verdict upon the grounds that the evidence was undisputed that Scales did practice fraud, false swearing and misrepresentation as against the defendants herein, who were insurors of the buildings and equipment, and upon the further grounds that the verdict was against the weight of the evidence insofar as it found that Scales did not burn his feed mill or cause it to be burned and insofar as it found that Scales did not practice fraud, false swearing and misrepresentation as against the defendants herein. The defendants' motions for a judgment notwithstanding the verdict and for new trial were each thereupon sustained. Action was reserved, however, upon the assessment of damages upon the defendants' counter-claims. A notice of appeal was filed by the plaintiff on January 19, 1963, from the order of December 20, 1962. This notice of appeal constitutes the basis of the appeal in Docket No. 15286.

Upon January 25, 1963, the Court entered a further order disposing of all pending matters, including an affidavit of bias filed by the plaintiff and including the counter-claim based upon alleged bad faith bringing of the suit by the plaintiff. The Court allowed the defendants a judgment of $6,250.00 against the plaintiff upon this counter-claim. A third notice of appeal, which constitutes the appeal in Docket No. 15345, was thereupon filed by the plaintiff, appealing from the order of January 25, 1963. The opinion of the Court upon which the foregoing orders were entered appears under the style of **Smith v. Insurance Co. of North America**, 213 F. Supp. 675.

It is apparent from the foregoing statement of the record that the appeals taken November 7, 1962, and

January 19, 1963, in Dockets Nos. 15285 and 15286 respectively, were prematurely taken in that the orders from which they were taken were not final judgments subject to appeal under 28 U. S. C. 1291. The alternate motions for judgment notwithstanding the verdict or for new trial filed May 28, 1962, remained pending at the time the notice of appeal was filed in both Dockets Nos. 15285 and 15286 and the motions were not finally disposed of until the order of the Court entered January 25, 1963. These appeals should therefore be dismissed. The filing and pendency of these untimely appeals did not divest the Trial Court of jurisdiction to proceed to a final judgment. **United States v. Crescent Amusement Co.**, 323 U. S. 173, 65 S. Ct. 254, 89 L. Ed. 160 (1944); **Healy v. Pennsylvania R. Co.**, 181 F. 2d 934, cert. den. 340 U. S. 935, 71 S. Ct. 490, 95 L. Ed. 674 (C. C. A. 3, 1950); **Resnik v. LaPaz Guest Ranch**, 289 F. 2d 814 (C. C. A. 9, 1961). Furthermore, all issues raised by the appeals in Dockets Nos. 15285 and 15286 are likewise asserted in Docket No. 15345, which appeal the Court will now proceed to consider.

The appellant (the plaintiff below) contends that the Trial Court was in error (a) in granting the judgment notwithstanding the verdict, (b) in granting the motion for new trial, (c) in awarding damages against the plaintiff for a statutory bad faith penalty without submitting this issue to the jury, and after such claim was barred by the statute of limitations applicable to claims against estates, and (d) in ruling upon the defendants' motion for judgment notwithstanding the verdict and new trial after the filing of an affidavit of bias by the plaintiff.

In granting the defendants' motion for judgment notwithstanding the verdict, the Trial Court concluded that the evidence was undisputed that Joe W. Scales, the insured, in his sworn proof of loss had overstated the size of the grain bins and the amount of grain claimed to have been lost in the fire. The Trial Court further concluded

that Scales had made these false representations "knowing either that they were not true or that he did not know they were true," and was thus guilty of fraud, false swearing and willful misrepresentation as a matter of law, thereby entitling the defendants to a judgment notwithstanding the verdict.

A review of the record in this case reveals that it is undisputed in the record that an error or misstatement was made in the proof of loss with respect to the dimensions of certain of the grain storage bins. The proof of loss stated that certain bins involved in the fire had overall dimensions of 20′ x 52′ x 30′, when in fact the bins measured 16′ x 30′ x 17.5′. To constitute false swearing and willful misrepresentation so as to bar the plaintiff's recovery as a matter of law, however, it must appear undisputed that misstatements in the proof of loss were knowingly made with the intent to deceive or defraud the insuror. The knowledge or lack of knowledge as well as the intention or lack of intention upon the part of Scales can only be inferred from all of the circumstances under the record in this case. Scales had died prior to the trial. His statement, taken by the defendants prior to the institution of the lawsuit, was introduced at the trial by stipulation. However, only portions of it appear to have ever been read to the jury. No awareness upon the part of Scales of any error, much less any admission of willful misrepresentation, is made in this statement. In our opinion the issue of the knowledge or intention of Scales was a disputed issue of fact which required submission of that issue to the jury. The intent with which a false representation is made and the existence of fraud is ordinarily a question of fact to be decided by the jury in view of all of the circumstances. **Rooks v. American Brass Co.**, 263 F. 2d 166 (C. C. A. 6, 1959); **Arkansas Fuel Oil Co. v. Magrath Oil Co.**, 131 F. 2d 318 (C. C. A. 6, 1942); **Simon v. Goodyear Metallic Rubber Shoe Co.**, 105 F. 573 (C. C. A. 6, 1900); 24 **Am. Jur.**, Fraud and Deceit, Sec. 295. The

Trial Court was therefore in error in granting the judgment notwithstanding the verdict upon the issue of fraud, false swearing and willful misrepresentation.

Upon the defendants' alternate motion for new trial, the Trial Court concluded that the verdict of the jury was against the great weight of the evidence both upon the issue of fraud and upon the issue of arson and therefore granted the defendants' motion for a new trial. The action of the Trial Court in ruling upon the motion for new trial after having sustained the judgment notwithstanding the verdict was in accordance with the rule in the case of **Montgomery Ward & Co. v. Duncan,** 311 U. S. 243, 85 L. Ed. 147, 61 S. Ct. 189 (1940). The plaintiff contends that the Trial Court was in error in granting the motion for new trial.

The granting of a new trial upon the ground that the verdict is contrary to the weight of the evidence is a matter resting in the sound discretion of the Trial Judge and his action thereon is not reviewable upon appeal except upon a showing of a clear abuse of discretion. As was stated by this Court in the case of **Turner v. United States,** 229 F. 2d 944 (C. C. A. 6, 1956), at page 945:

> "The controlling question is whether the order of the District Court granting a new trial constituted a clear abuse of discretion. (Citations omitted.) It was held in the **Spero-Nelson** case (**Spero-Nelson v. Brown,** 175 F. 2d 86) that where the jury's verdict resolves a factual question the trial court's action in overruling such motion cannot be reviewed by the Court of Appeals unless it involves an abuse of discretion. The granting or refusing of a new trial is a matter resting in the sound discretion of the trial judge and his action thereon is not reviewable upon appeal save the most exceptional circumstances. **Aetna Casualty & Surety Co. v. Yeatts,** 4 Cir., 122 F. 2d 350, 352-354. We therefore are concerned only as to whether the

> District Court clearly abused its discretion in granting the new trial. Cf. **Hill v. Pennsylvania Greyhound Lines, Inc.**, 3 Cir., 174 F. 2d 171, 172. An appellate court reviewing an order granting a new trial will consider all intendments in favor of the order made by the trial judge. The order will not be reversed if the record discloses any tenable ground in support of the order. (Citation omitted.)"

A review of the record in this case reveals that there was no abuse of discretion by the Trial Court in granting the defendants' motion for a new trial. There was substantial evidence in the record to the effect that the insured had been guilty of fraud and false swearing in the proof of loss and that he had participated in procuring of the burning of the subject property.

Having concluded that the judgment notwithstanding the verdict should be set aside but that the Trial Court did not abuse its discretion in granting a new trial, it is not necessary to consider other issues raised in this appeal. The action of the Trial Court in granting the judgment notwithstanding the verdict will be reversed but the order granting a new trial will be affirmed and the case remanded accordingly.

OFFICE SUPREME COURT, U.S.
FILED
JAN 8 1965
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 757

HELEN CORINNE SCALES TRICE, Executrix,
Petitioner,

vs.

COMMERCIAL UNION ASSURANCE COMPANY, LTD., et al.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO A PETITION FOR CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

LON P. MACFARLAND
Middle Tennessee Bank Bldg.
Columbia, Tennessee

WILLIAM B. CAIN
Middle Tennessee Bank Bldg.
Columbia, Tennessee

JOE W. HENRY, JR.
112 South First
Pulaski, Tennessee

D. C. LEE
First National Bank Bldg.
Pulaski, Tennessee
Attorneys for Respondents

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City, Mo. 64106, HArrison 1-3030

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Zegan v. *The Central R. R. Co. of New Jersey*, 266 F. 2d 101 ..... 21, 24, 25

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RULES CITED

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Federal Rules of Civil Procedure 54(b) 12
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Federal Rules of Civil Procedure 60(b) 6, 18
Federal Rules of Civil Procedure 73(a) 13, 17
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 757

HELEN CORINNE SCALES TRICE, Executrix,
Petitioner,

vs.

COMMERCIAL UNION ASSURANCE COMPANY, LTD., et al.,
Respondents

BRIEF OF RESPONDENTS IN OPPOSITION TO A PETITION FOR CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

MAY IT PLEASE THE COURT:

Respondents aver that the only "question presented" by this petition for certiorari is:

"Do special and important reasons exist in this case within the meaning of Rule 19 of the Supreme Court Rules?"

Respondents aver that this question should be answered "No".

STATUTE AND RULES OF CIVIL PROCEDURE

In addition to the statutes and rule of Civil Procedure set forth in the petition for certiorari, respondents aver that the following Rules of Civil Procedure are involved:

Federal Rule of Civil Procedure 50(b) provides:

> "(b) *Reservation of Decision on Motion.* Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

Federal Rule of Civil Procedure 59 provides:

> "Rule 59. *New Trials; Amendment of Judgments* (a) *Grounds.* A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of

the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) *Time for Motion.* A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) *Time for Serving Affidavits.* When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) *On Initiative of Court.* Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) *Motion to Alter or Amend a Judgment.* A motion to alter the judgment shall be served not later than 10 days after entry of the judgment."

STATEMENT OF THE CASE

Respondents accept the statement of the case of the petitioner with the following supplement:

The jury verdict was rendered May 18, 1962 (Append. 61b-64b). The clerk, pursuant to said verdict, made the following docket entry on May 25, 1962, to-wit:

"Proceedings

"5-25-62 Judgement hereby entered by oral order of the Court from the bench May 18, 1962, upon special jury verdict in favor of the plaintiff, Helen Corinne Scales Trice, executrix of the Will of Joe W. Scales, deceased, and against the defendants, Commercial Union Assurance Company, Limited; American National Fire Insurance Company; North British and Mercantile Insurance Company, Limited; New Hampshire Fire Insurance Company; Citizens Insurance Company of New Jersey; Queen Insurance Company of America; and the Home Insurance Company in the sum of $25,000.00 for damages to insured building items and in the sum of $20,000.00 for damages to insured machinery and equipment items. F. E. W., D. C.

"5-25-62 Judgment hereby entered by the Clerk on the general verdict of the jury May 18, 1962, in favor of the Insurance Company of North America and the United States Fidelity and Guaranty Company as Defendants, and in favor of the same parties as counter-claimants in the sum of $3,000.00 against the Plaintiff, Helen Corinne Scales Trice, executrix of the will of Joe W. Scales, deceased. F. E. W., D. C."

(Append. 2a)

On May 28, 1962, the tenth day after the jury verdict and the third day after the clerk's docket entry, the respondents filed their "Motion of Certain of the Defendants for an Order Setting Aside the Verdict and Judgment Against These Defendants and for Entry of Judgment in Accordance with These Defendants' Motion for a Directed Verdict and in the Alternative for a New Trial". (Append. 2b-12b).

Pursuant to the plaintiff's own motion to amend the original judgment of May 25th, which motion was filed June 4, 1962 (Append. 13a-14a), the Court asked counsel to submit a proposed order. Both counsel for the plaintiff and counsel for the defendants submitted proposed orders to the Court, together with briefs on the merits thereof. After consideration of the same the Court entered its order of July 23, 1962. (Append. 15a-22a). In said order the Court specifically approved the jury verdict in favor of the companies insuring grain items and, as to the buildings and machinery items, amended the judgment of May 25th "As of May 25th" allowing interest to plaintiff from the filing of suit and allowing credit to the defendants for payments to the mortgagees and taxing costs, but did not approve the jury verdict as to the buildings and machinery items.

Within ten (10) days after the entry of July 23rd "Order", defendants filed a motion under Rule 59(e) to amend said judgment by disallowing interest and in the same motion, out of an abundance of caution, renewed and reiterated their motion of May 28, 1962. (Append. 12b-13b).

On October 8, 1962, the Court overruled both the motion of the defendants to disallow interest to the plaintiff from the time suit was filed, and the motion of the plaintiff to vacate that portion of the judgment crediting the defendants with sums paid the mortgagees, but in said order specifically noted the continuing pendency of the defendants' motion for judgment notwithstanding the verdict or in the alternative for a new trial. (Append. 27a-29a).

Plaintiff, then on November 7, 1962, appealed from "that part of the judgment and order entered July 23,

1962" allowing the defendants credit for all payments to the mortgagees, and from "that part of the order entered on October 8, 1962, overruling the plaintiff's motion to alter said judgment entered on July 23, 1962", by which motion the plaintiff had sought to delete the provision crediting the defendants with mortgagee payments. (Append. 57a-58a).

On December 20, 1962, subsequent to the "Notice of Appeal" of the plaintiff filed November 7, 1962, the Court entered an order denying the plaintiff's motion for relief under Rule 60(b4) and pursuant to the defendants' motion of May 28 for judgment notwithstanding the verdict and in the alternative for a new trial, set aside the verdict of the jury insofar as the verdict found the plaintiff's testator, Joe W. Scales, did not burn his feed and seed mill or cause it to be burned and insofar as said verdict found that Scales was not guilty of fraud, false swearing or willful concealment or misrepresentation as against these defendants. Final judgment was reserved pending disposition of the questions raised by the counter-claims of these defendants wherein they sought to recover a statutory penalty from the plaintiff under Section 56-1106, Tennessee Code Annotated, for bringing suit in bad faith. (Append. 14b-15b). This order was accompanied by an extended memorandum which is a part of the record in this cause. (See 213 F. Supp. 675).

On January 19, 1963, plaintiff appealed from the December 20, 1962, order. (Append. 93a-94a).

On January 25, 1963, the Court entered a "Supplemental Memorandum and Order" disposing of all pending matters, expressly sustaining the defendants' motion filed May 28, 1962, for both judgment notwithstanding the verdict and for a new trial. (Append. 15b-16b) (See 213 F. Supp. 675).

Plaintiff's first appeal, that is the one filed November 7, 1962, was designated in the United States Court of Appeals in the Sixth Circuit as Docket No. 15285.

The plaintiff's second appeal, that is the one filed January 19, 1963, was assigned Docket No. 15286 in the Court of Appeals

The plaintiff's third appeal, which was taken from the final order of the trial Court entered January 25, 1963, was assigned Docket No. 15345.

On July 14, 1964, the United States Court of Appeals for the Sixth Circuit issued its decision reversing the action of the trial Court insofar as the judgment notwithstanding the verdict was concerned. The Court, however, affirmed the action of the trial Court in sustaining these defendants' motion for a new trial.

ARGUMENT

Section I—Do special and important reasons exist in this case within the meaning of Rule 19 of the Supreme Court rules?

Respondents aver that this question should be answered "No".

The jurisdiction of the Supreme Court on a writ of certiorari is necessarily restricted and may only be granted when there are "special and important reasons" therefor.

> "This rule, formulated thirty years ago, embodies the criteria developed ever since the Evarts Act of 1891, by which the Court determines whether a particular case merits consideration, with due regard to the proper functioning of the limited reviewing power to which this Court is confined, decisively restricted through the creation of the intermediate Courts of Ap-

peals and more largely confined by the Judiciary Act of 1925....

"'Special and important reasons' imply a reach to a problem beyond the academic or the episodic."

Rice v. *Sioux City Cemetery*, 349 U. S. 70, 75 S. Ct. 614, 99 L. ed. 897.

A writ of certiorari is governed by Rule 19 of the Supreme Court rules and "does not provide a normal appellate channel in any sense comparable to the writ of error."

Fay v. *Noia*, 372 U. S. 391, 83 S. Ct. 822, 9 L. ed. 2d 837.

"The jurisdiction to bring up cases by certiorari from the Circuit Court of Appeals was given for two purposes: first, to secure uniformity of decision between those courts in the nine Circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that 80% of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

Magnum Import Co. v. *De Spoturno Coty*, 262 U. S. 159, 163, 164, 43 S. Ct. 531, 67 L. ed. 922, 924.

Tested by the above rules, respondents aver that the petition is insufficient. It seeks "merely to give the defeated party in the Circuit Court of Appeals another hearing."

Section II—Answers to petitioner's questions.

Question No. 1 asserted by the petition is whether or not appeal No. 15285 was a premature appeal and thus void.

It has long been settled that the United States Court of Appeals can only review a final judgment. This requirement of the Code has existed since the Judiciary Act of 1789.

1 Stat. 73.

Cobbledick v. *U. S.*, 309 U. S. 323, 84 L. ed. 783.

Catlin v. *U. S.*, 324 U. S. 229, 89 L. ed. 911.

The rule is well settled and of long standing that a judgment or decree to be final must terminate the litigation between the parties on the merits of the case so that, if there should be an affirmance here, the Court below would have nothing to do but execute the judgment or decree it had already rendered.

Bostwick v. *Brinkerhoff*, 106 U. S. 3, 27 L. ed. 73.

Baltimore & Ohio Railway Co. v. *United Fuel & Gas Co. et al.*, 154 F. 2d 545.

An order, judgment or decree which does not have this effect—one which leaves the rights of the parties to the suit undetermined and subject to further adjudication —is not a final decision.

Morgan v. *Thompson*, 124 F. 203.

Baltimore & Ohio Railway Co. v. *United Fuel & Gas Co. et al.*, 154 F. 2d 545.

Where a claim is incidental to and dependent upon the ultimate recovery in the principal claim by the same party and ultimate defeat of the principal claim would render the incidental and dependent claim moot, an appeal will not lie separately to an adverse ruling on the incidental and dependent claim but an appeal must await the ultimate decision on the principal claim.

Panichella v. *Pa. R. R. Co.*, 252 F. 2d 452.

Flegenheimer v. *Mantiboa Sugar Co., Ltd.*, 182 F. 2d 742.

Baltimore & Ohio Railway Co. v. *United Fuel & Gas Co. et al.*, 154 F. 2d 545.

It is well settled that a case may not be brought here by writ of error or appeal in fragments; that to be reviewable a judgment or decree must be not only final, but complete; final not only as to all the parties, but as to the whole subject matter and as to all causes of action involved; and that if the judgment or decree be not thus final and complete the writ of error or appeal must be dismissed for want of jurisdiction.

Hohorst v. *Hamburg-American Packet Co.*, 148 U. S. 262, 37 L. ed. 443.

Collins v. *Miller*, 252 U. S. 364, 64 L. ed. 616.

Oneida Navigation Corp. v. *W & S Job & Co.*, 252 U. S. 521, 64 L. ed. 697.

United States for the Use and Benefit of David J. Mustin et al. v. *Alcon Development Corp.*, 271 F. 2d 901.

Tauzin v. *St. Paul Mercury Indemnity Co.*, 195 F. 2d 223.

In *Tauzin* v. *St. Paul Mercury Indemnity Co.*, 195 F. 2d 223, the Court of Appeals of the Fifth Circuit dismissed the appeal for want of jurisdiction, holding that the appeal was not perfected from a final decree. This was done even though the Court of Appeals determined in its opinion the District Court clearly erred in dismissing the complaint. The Court of Appeals reasoned that though the lower Court had dismissed the complaint as to one defendant, the case was still pending before the District Court as to a second defendant and thus the order of dismissal was not final and not appealable.

The finality of a judgment does not depend on its correctness but on whether it disposes of all the issues.

Phelan v. *Middle States Oil Corp.*, 210 F. 2d 360.

A final judgment is one which disposes of the whole subject, gives all the relief that was contemplated, pro-

vides with reasonable completeness for giving effect to the judgment and leaves nothing to be done in the cause save to superintend ministerially the execution of the decree.

Grand Trunk Western Railway Co. et al. v. *McHie,* C. A. 6th Circuit, 100 F. 2d 86.

Turnbull v. *United States of America,* C. A. 6th Circuit, 139 F. 2d 126.

City of Louisa v. *Levi,* 140 F. 2d 512.

A judgment cannot be final where it is impossible for the party in whose favor the decision is made to obtain any benefit therefrom without resetting the cause for hearing before the Court upon a reservation made in the judgment itself.

City of Louisa v. *Levi,* 140 F. 2d 512.

Nothing done by either party or even by both parties in concert can vest jurisdiction in the Court to review a case over which, under the controlling statute, jurisdiction does not exist.

State of Texas v. *Chuoke,* 154 F. 2d 1.

City of Louisa v. *Levi,* 140 F. 2d 512.

Royalty Service Corp. v. *City of Los Angeles,* 98 F. 2d 551.

Stevens v. *Turner,* 222 F. 2d 352.

Motions for new trial and for judgment notwithstanding the verdict operate to vest in the trial Judge continued control over the judgment and until disposed of the judgment does not become final for the purposes of review; and where the motion remains to be acted upon below there is lacking the final decision necessary to appellate jurisdiction.

Green v. *Reading Co.,* 180 F. 2d 149.

Piece meal appeals are not encouraged.

County Bank of Greenwood, South Carolina, v. *First National of Atlanta,* 184 F. 2d 152.

In *Taylor* v. *Board of Education, etc.*, 288 F. 2d 600, the United States Court of Appeals for the Second Circuit recited a detailed analysis of the historic application of the fundamental rule of finality as a condition to review in Federal appellate procedure.

By no stretch of the imagination could this appeal, No. 15285, be construed to be within the scope of Rule 54(b) so as to allow a severable appeal. That Rule provides a means of appeal from a portion of a judgment or a separable part of a case, but only upon two conditions, to-wit:

(1) Direction by the Court for the entry of a final judgment upon one or more, but less than all of the claims, and;

(2) upon an expressed determination by the Court that there is no just reason for delay.

Rule 54(b), Federal Rules Civil Procedure.

Beredict Aviation Corp. v. *Glass,* 195 F. 2d 267. See annotation 38 A.L.R. 2d 378.

The Court having made no determination in compliance with the conditions of Rule 54(b), the July 23, 1962, order is not appealable under Rule 54(b).

Sears-Roebuck v. *Mackey,* 351 U. S. 427, 76 S. Ct. 895, 100 L. ed. 1297.

Cold Metal Process Co. et al. v. *United Engineers Foundry Co.,* 351 U. S. 445, and Annotation thereto, 76 S. Ct. 904, 100 L. ed. 1311.

Phinney v. *Houston Oil Field Material Co.,* 252 F. 2d 357.

Thus, the July 23rd order was not appealable and any effort by the plaintiff to appeal that order was a nullity.

U. S. v. *Crescent Amusement Co.,* 323 U. S. 173, 65 S. Ct. 254, 89 L. ed. 160, Rehearing Denied 323 U. S. 818, 65 S. Ct. 437, 89 L. ed. 650.

U. S. v. *Martin,* 267 F. 2d 764.

The trial Court retained jurisdiction of the cause in spite of the void appeal, No. 15285, as a trial Court is not required to suspend its proceedings while a party proceeds or attempts to proceed with an improvident and untimely appeal.

Resnik v. *La Paz Guest Ranch*, 289 F. 2d 814.
Healy v. *Pa. Rwy. Co.*, 181 F. 2d 934, Cert. Denied 340 U. S. 935, 71 S. Ct. 490, 95 L. ed. 674.
Taylor v. *Board of Education*, 288 F. 2d 600.

Tested by the above well settled rules, the appeal in No. 15285 filed on November 7, 1962, was an absolute nullity If the May 25, 1962, docket entry of the Court was sufficient under Rule 79(a), then time for appeal under Rule 73(a), and/or time for filing amendatory motions sufficient to suspend the finality of the May 25th docket entry until determination of said motions, began to run from and after May 25, 1962. The motion of the respondents filed on May 28, 1962, was a combined motion under Rule 50(b) for judgment notwithstanding the verdict and for judgment in the alternative for a new trial. Such a procedure was clearly proper.

Montgomery Ward & Co. v. *Duncan*, 311 U. S. 243, 85 L. ed. 147, 61 S. Ct. 189.

This motion as a matter of law suspended the entire cause for purposes of appeal until said motion was ruled upon by the Court.

Green v. *Reading Co.*, 180 F. 2d 149.

The same reasoning above is equally applicable to Appeal No. 15286 which purported to be perfected from the December 20, 1962, order of the Court. That order was expressly declared to be interlocutory by the Court and, thus, clearly not appealable.

Contrary to the statement in the petition, the judicial function in this case was not performed in an unusual way.

Analysis will indicate that on May 18, 1962, the jury returned its verdict. (Append. 61b-64b). It found fraud as to the grain claim and assessed a statutory penalty (Tennessee Code Annotated, Section 56-1106), against the petitioner in that the suit was brought in bad faith. The petitioner did not appeal from the grain judgment but instead promptly paid the $3,000.00 penalty. The jury verdict provided a recovery on building and machinery items in favor of the petitioner for $25,000.00 and $20,000.00, respectively, this in spite of the fact that the evidence disclosed conclusively that the proof of loss had inflated the size of the main storage vessel to nearly four (4) times its actual size. (Append. 32b-37b, 39b-40b, 60b). (Absent the inflated grain bin, the combined capacity of all storage facilities in the mill was inadequate to hold the amount of grain asserted in the proof of loss). (Pl. Ex. 2, Append. 32b-36b). Respondents promptly thereafter began the preparation of their motion under Rule 50(b) for judgment notwithstanding the verdict in view of the fact that the Rule provides that such motion must be filed within ten (10) days after the returning of the jury verdict.

On May 25, 1962, the Clerk, pursuant to Rule 79(a), noted the judgment on his docket. (Append. 2a). Respondents, deeming that this notation might well be adequate to constitute the judgment of the Court and that time for appeal and/or appropriate motions under Rule 59 might commence as a result of said docket entry, determined to combine the motion for judgment notwithstanding the verdict with the motion for a new trial and to file the combined motion within ten (10) days following the rendition of the jury verdict. This was done. (Append. 2b-12b).

Thereafter, on June 4, 1962, the petitioner moved the Court to amend the judgment to include interest from the date the suit was filed. (Append. 13a-14a). The Court

then instructed the Clerk to advise counsel on both sides to submit a proposed order according to the usual practice. Each side prepared and submitted such a judgment and a brief in support of the proposal. Thereafter, on July 23, 1962, the Court entered a formal and detailed order setting forth the procedural steps and the verdict of the jury, approving the judgment of fraud as to the grain claims, adding interest as requested by the petitioner, crediting the respondents with payments made to the mortgagee under the loss payable clause and amending the May 25th order "as of May 25, 1962" so as to accomplish the interest addition and mortgagee payment credit. (Append. 15a-22a).

No action was taken on the respondents' motion of May 28, 1962, previously filed. Unquestionably the May 28th motion was timely under Rule 50(b) as a motion for judgment notwithstanding the verdict and in the alternative for a new trial. But when confronted with the ruling of the Supreme Court in *United States* v. *Schaefer Brewing Co.*, 356 U. S. 227, 78 S. Ct. 674, 2 L. ed. 2d 721, respondents determined that prudence, diligence and safety dictated that the May 28 motion should be reiterated within ten (10) days after the July 23, 1962 order. Thus on July 30, 1962, the respondents combined the following statement with a motion to disallow interest, to-wit:

> "The defendants herein having previously, on May 28, 1963, filed a motion for a new trial subsequent to the docket entry of the Clerk pursuant to the verdict of the jury, these defendants not waiving any rights resulting from said filing of said motion but expressly relying thereon to the hearing, here and now reaffirm and reiterate said motion previously filed May 28, 1962, and incorporated it herein by reference as fully and completely as though the same were copied fully herein."
>
> (Append. 12b-13b)

Thereafter, on August 2, 1962, the petitioner filed a motion seeking to vacate the July 23rd order insofar as said order gave the defendants credit for sums paid to the mortgagees under the loss payable clauses of the policies. (Append. 23a-26a).

On October 8, 1962, the Court entered an order overruling the defendants' motion of July 30 insofar as it sought to disallow interest on the judgment from the time of the filing of suit and also overruling in its entirety the petitioner's motion to disallow credit for the mortgagee payments. This order of October 8, 1962, contained the following explicit recitations:

> "Within ten days after the Court's order of July 23, 1962, settling the judgment in this case, the remaining plaintiff, Helen Corinne Scales Trice, Executrix, and the remaining defendants, Commercial Union Assurance Company, Limited; American National Fire Insurance Company; North British and Mercantile Insurance Company, Limited; Citizens Insurance Company of New Jersey; Queen Insurance Company of America; Home Insurance Company, and New Hampshire Fire Insurance Company moved the Court to amend the judgment further.
>
> "These motions and the same defendants' motion for judgment notwithstanding the verdict and for a new trial were heard September 17, 1962. Decision was reserved, pending filing of a transcript of the evidence, on the defendants' motion for judgment and for new trial but the other two motions have been argued and briefed and are now before the court for decision."
> (Append. 27a-29a)

On December 20, 1962, the Court entered a memorandum and order expressly sustaining the May 28, 1962, motion of respondents for both judgment notwithstanding the verdict and in the alternative for a new trial. In this order

the Court reserved for future disposition the counterclaims of respondents for the statutory bad faith penalty sought against the petitioner. (Append. 14b-15b).

On January 25, 1963, the Court entered its final order disposing of pending matters and within thirty (30) days thereafter the petitioner perfected appeal No. 15345, which was a valid appeal. (Append. 15b-16b).

Thus, as held by the trial Court and the Sixth Circuit Court of Appeals, there was no inconsistency in the procedure in this cause.

Petitioner's argument concerning its appeal No. 15285 is destroyed by its own terms. If the July 23, 1962, order was the final act of the Court disposing of all matters, including motion for judgment notwithstanding the verdict and motion for a new trial, etc., what action taken by the petitioner could have tolled the running of time for appeal under Rule 73(a)? According to the petitioner's reasoning, all motions having the effect of suspending appeal time had been filed subsequent to the May 25, 1962, docket entry, and were completely disposed of by the July 23, 1962, order. Upon what authority then can the petitioner assert that a motion filed by the petitioner subsequent to the July 23, 1962, order could have the effect of suspending the operation of the thirty (30) days appeal limitation of Rule 73(a)? Petitioner did not perfect his appeal until November 7, long after the thirty (30) days limitation for appeal from the July 23, 1962, order had expired. Under the petitioner's theory, the July 23rd order, being final and disposing of all previous motions suspending appeal time, then no motion filed by the petitioner after the July 23rd order would be effective to suspend his time for appeal, which would automatically have expired thirty (30) days after the July 23, 1962, order.

Yates v. *Behrend*, 280 F. 2d 64.

Stone v. *Hon. Wyoming Supreme Ct.*, 236 F.2d 275.
Marten v. *Hess*, 176 F. 2d 834.
Moore's Federal Practice, 2d Ed., Vol. 6, 3848.

Neither would Rule 60(b) render any assistance to the petitioner in this respect as such a motion does not toll the time for appeal.

Saenz v. *Kenedy*, 178 F. 2d 417.
Markert v. *Swift*, 173 F. 2d 517.
Sutherland v. *Fitzgerald*, 291 F. 2d 846.
Moore's Federal Practice, 2d Ed. Vol. 7, 331.

Thus, at every approach the petitioner's purported appeal, No. 15285, is void.

Questions No. 2 and No. 3 of the petition and the authorities cited in connection therewith (pages 16 through 21 of the petition) indicate a complete misconception of the applicable rules of law. Each of the cases cited supports an entirely different principle of law than that which is at issue in this cause.

Soler and Company v. *United Firemen's Insurance Co.*, 299 U. S. 45, 57 S. Ct. 54, 81 L. ed. 30, was a case involving a fire insurance policy and the defense of fraud. The jury returned a verdict for the plaintiff, which verdict was *approved by the trial Judge*. Plaintiff appealed and the First Circuit Court of Appeals reversed and dismissed the case saying:

> "It is perfectly plain that the verdict of the jury is entirely inconsistent with the allegations of the complaint and the proof of loss and we think the disparity of nearly $19,000.00 shows on its face and as a matter of law that the sworn proof of loss was fraudulent. . ."

The Supreme Court reversed the Court of Appeals on the grounds that there was conflicting evidence and, thus, a

jury question. Nowhere in the case did it appear that the discretionary action of a trial Court in granting a new trial was in issue. In the Soler case the trial Court was satisfied with the verdict and approved it. In the case at Bar the trial Court specifically disapproved the verdict and exercising its discretion granted a new trial.

In *Aetna Life Insurance Company of Hartford, Connecticut*, v. *Ward*, 140 U. S. 76, 11 S. Ct. 720, 35 L. ed. 371, the only question at issue was whether or not a verdict should have been directed. The Court held the evidence to be conflicting and, thus, to present a jury question. In this case, as in the Soler case, the trial Court approved the verdict of the jury and the question of the degree to which the discretionary action of the trial Court in granting a new trial is reviewable on appeal was in no way involved.

Lavender v. *Kurn*, 327 U. S. 645, 66 S. Ct. 232, 90 L. ed. 916, was an action under the Federal Employers' Liability Act. The jury returned a verdict for the plaintiff. The verdict was approved by the trial Court, but on appeal the Supreme Court of Missouri reversed and dismissed holding that there was no substantial evidence of negligence and, thus, no jury question. The Supreme Court of the United States reversed holding that a jury question was involved. Counsel for the petitioner, quoting from the Lavender case, stated:

> "Under these circumstances it would be an undue invasion of the jury's historic function for an *appellate* court to weigh the conflicting evidence, judge the credibility of witnesses, and *arrive at a conclusion opposite from the one reached by the jury.*" (Emphasis added).

In the Lavender case likewise the trial Court had approved the jury verdict. No question was presented in regard to

the action of the trial Court in the discretionary granting of a new trial.

In *Myers* v. *Reading Co.*, 331 U. S. 477, 67 S. Ct. 1334, 91 L. ed. 1615, the jury returned a verdict for the plaintiff under the Safety Appliance Acts.

> "At the close of the evidence, respondent moved for a *directed verdict.* The motion was not granted, and the jury returned a verdict for $5,000 in favor of the petitioner. The respondent then moved to have the verdict set aside *and to have judgment entered in its favor.* On December 28, 1945, this motion was granted and judgment was entered."

The Supreme Court reversed holding that the evidence conflicted to the point that a jury question was involved. This case again did not involve the action of the trial Court in granting a new trial, but only the action of the trial Court in directing a verdict.

Citing the foregoing cases and quoting excerpts therefrom, the petitioner states that they contained "applicable rules of law declared by this Court and how they were disregarded by the District Court". Respondents aver that these cases disclose excellent rules of law almost universally accepted in all jurisdictions, but that such rules simply have no application to the matter at Bar. All of these cases and the rule presented thereby refer to a situation where a trial or appellate Court has not only set aside a verdict of a jury, but has directed a verdict directly contrary to that rendered by the jury. In the case at Bar, as it now stands, the trial Court was simply dissatisfied with the verdict of the jury and with the conduct of counsel for plaintiff. It refused to allow the verdict to stand and ordered a new trial.

It is well to note at this point that all of the cases cited by the petitioner which arose under the Federal Employers

Liability Act are subject to an entirely different standard in regard to the question of negligence. In order to sustain an action under the Federal Employers Liability Act the degree of negligence necessary is minute.

> "We must be mindful that under this statute (FELA) the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, *even the slightest,* in producing the injury or death for which damages are sought." (Emphasis added).
>
> *Rogers* v. *The Mo. Pacific Rwy. Co.,* 352 U. S. 500, 1 L. ed. 2d 493, 77 S. Ct. 443.
>
> *Zegan* v. *The Central R. R. Co., of New Jersey,* 266 F. 2d 101.

The rule in Federal Courts and in all other jurisdictions is well settled that:

> "The granting or refusing of a new trial is a matter resting in the sound discretion of the trial Judge and his action thereon is not reviewable upon appeal save in almost exceptional circumstances."
>
> *Aetna Casualty & Surety Co.* v. *Yeatts,* 4th Circuit, 122 F. 2d 350, 352-354.
>
> *Turner* v. *United States,* 229 F. 2d 944.

Thus, the authorities cited by the petitioner involve a directed verdict contrary to that reached by the jury, whereas the case at Bar involves not a termination of the case contrary to the jury verdict but the exercising by a trial Judge of his discretionary power to order a new trial.

Petitioner thereafter proceeds with a similar misconception of the law in expounding what she conceives to be applicable rules of law declared by this Court and how they were disregarded by the Court of Appeals. Petitioner thus cites *Hepburn* v. *Dubois,* 12 Pet. Reports, 345, 9 L. ed. 1111.

Again this case involved an adverse jury verdict which had been *approved* by the trial Court. The defendant sought on his appeal to have the jury verdict set aside and a verdict directed in his favor. The Supreme Court held that there was competent evidence to support the jury verdict and that same would not be disturbed. The case had nothing to do with the trial Court exercising its discretion and ordering a new trial.

In *Tennant* v. *Peoria and Pekin Union Railway Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. ed. 520, plaintiff brought an action under the Federal Employers Liability Act. The jury returned a verdict for the plaintiff and the *District Court entered judgment accordingly.* On appeal by the defendant the Seventh Circuit Court of Appeals

> "Reversed this judgment after finding that, while there was evidence of negligence by respondent, there was no substantial proof that this negligence was the proximate cause of Tennant's death."
> 134 F. 2d 860.

It held that the District Court should have *directed a verdict in favor of the respondent or allowed its motion for judgment notwithstanding the verdict.* The Supreme Court reversed saying:

> "Upon examination of the record we cannot say that the inference drawn by this jury that respondent's negligence caused the fatal accident is without support in the evidence. Thus to enter a judgment for the respondent *notwithstanding the verdict* is to deprive petitioner of the right to a jury trial." (Emphasis added).

The case had nothing to do with review of an order granting a motion for a new trial.

Basham v. *Pa. R. R. Co.*, 372 U. S. 699, 83 S. Ct. 965, 10 L. ed. 2d 80, was another Federal Employers Liability

Act case wherein the jury rendered a verdict for the plaintiff. The trial Judge set aside the jury verdict and directed a verdict for the defendant on the ground that no negligence was established. The New York appellate division and Court of Appeals affirmed. The Supreme Court of the United States reversed holding that a jury question was presented, and that the New York Courts erred in setting aside the jury verdict and rendering judgment for the defendants. This case likewise had nothing to do with a trial Court exercising its discretion and granting a new trial.

The fallacy of the petitioner's argument on the aforementioned cases is the failure to distinguish between the law as applicable to a situation where a trial Court or appellate Court set aside a jury verdict *and directs a verdict for the opposite party*, and a situation wherein a trial Court disapproves the jury's verdict, sets it aside and *grants a new trial*. As to the former, the cases cited by the petitioner are applicable, and indeed the same principle was used by the Court of Appeals in the case at Bar wherein that Court reversed the action of the trial Court in granting judgment notwithstanding the verdict. In the latter situation, however, the cases relied upon by the petitioner are by their own terms inapplicable.

A motion for a new trial

> "is independent from the motion for judgment notwithstanding the verdict. It is governed by different principles. The motion for a new trial is addressed to the trial Judge's discretion and he should grant a new trial if he thinks the verdict is incorrect, or if for any reason the trial Judge is convinced that justice has not been done."
>
> *Johns* v. *Baltimore and Ohio R. R. Co.*, 143 F. Supplement 15, 23.

Even in the Federal Employers Liability Act it is noted that the granting or denial of a motion for a new trial is a subject discretionary with the trial Court and the exercise of discretion by the trial Court will not be disturbed on appeal. In *Zegan* v. *The Central R. R. Co. of N. J.*, 266 F. 2d 101, this very point was made. The trial Court granted a combined motion for judgment notwithstanding the verdict and in the alternative for a new trial. The Court of Appeals for the Third Circuit reversed the judgment notwithstanding the verdict but refused to interfere with the trial Court's granting of a motion for a new trial.

> "Twice recently we have refused to interfere with such an alternative grant of a new trial although we have reversed the accompanying judgment n. o. v. *Nenetti* v. *Evans Construction Co.*, 3rd Cir., 1958, 259 F. 2d 367; *Peters* v. *Smith*, 3rd Cir., 1955, 221 F. 2d 721. Whether in an extreme enough case there might be justification for a simultaneous reversal of both orders we need not decide. For in the circumstances of this case the ruling that the verdict was so contrary to the weight of the evidence that it could not justly stand was within the permissible exercise of judgment and discretion on the part of the trial judge.
>
> "We have recently had occasion to contrast the role of a trial judge in passing on a motion for judgment n. o. v. with his role in deciding a motion for a new trial. *Magee* v. *General Motors Corp.*, 3 Cir. 1954, 213 F. 2d 899. The one motion requires a judge to determine whether the evidence and justifiable inference most favorable to the prevailing party afford any rational basis for the verdict. The other requires that the trial judge evaluate all significant evidence, deciding in the exercise of his own best judgment whether the jury has so disregarded the clear weight of the credible evidence that a new trial is necessary to prevent injustice.

> "In this case, citing the Magee case, the trial judge made clear his understanding of the difference between these two functions. In addition the trial judge's analysis of the evidence indicated sufficient basis for his conclusion as to the weight of the evidence and his conviction that an unjust verdict had been rendered."
>
> *Zegan* v. *Central R. R. Co. of N. J.*, 266 F. 2d 101, 104.

If the trial Court in this cause had applied the standard asserted by the petitioner in Question No. 3 at pages 16 and 17 of the petition in ruling on the respondents' alternative motion for a new trial, such action would have been clearly reversible error. In *Williams* v. *Nichols*, 266 F. 2d 389, the trial Court followed exactly the procedure asserted by the petitioner in ruling on a motion for a new trial and the Court of Appeals for the Fourth Circuit reversed on the grounds that the application of such severe standard by the trial Court constituted error as a matter of law.

> "[4] However, the reluctance to disturb the action of a District Court upon a motion for a new trial for error of fact does not exist where the error is one of law; General American Life Ins. Co. v. Central Nat. Bank of Cleveland, supra; Youdan v. Majestic Hotel Management Corp., 7 Cir., 1942, 125 F. 2d 15. In other words, so long as the trial judge has committed no error of law in passing upon such a motion, his action will not normally be disturbed.
>
> Apparently the trial judge has, in this case, committed an error of law in that he has applied the wrong standard in his consideration and disposition of defendants' motion. The approach of the trial court is clearly shown by the following statement in his memorandum decision:

'The jury having found a verdict for the plaintiff, the Court, *in passing on the motion, must consider the evidence most favorable to the plaintiff and, considering the evidence in this light,* the Court is of the opinion that the defendant's motion should be denied.' (Emphasis supplied).

That the trial judge considered the evidence in the light most favorable to the plaintiff is disclosed by the recital, in the memorandum decision, of the facts pertinent to the nature, extent and duration of the plaintiff's injuries. Under the heading, 'Excessive Verdict', we find the following in the memorandum decision:

'The plaintiff was an able bodied, hard working man 53 years of age earning $1.60 per hour. Since the accident he had lost 8 to 10 pounds, is in constant pain, suffers constantly from severe headaches, is highly nervous and, although he is still working, he is unable to do his normal duties and *his doctor is of the opinion* that he should not be working at all. While he is only 53 years old, his physical condition has changed so that he is the equal of men 65 to 67 years old. As a result of his injuries, he suffered a whiplash, a moderate neck strain or pulling or straining of the muscles and ligaments, a lumbar sacro strain, and as a result of these injuries, a prior slight hypertension has been aggravated to a degree that *his doctor is of the opinion* he should be under medical care and observation for the rest of his life.' (Emphasis ours)

The foregoing statement was a summarization of the stated opinions and conclusions of the plaintiff's medical witnesses, particularly those of Dr. Bailey, and ignored completely the evidence of the defendants, i. e., the report of Dr. Jones.

The trial judge further stated:

'It can be assumed that juries are cognizant of the constantly diminishing value of the dollar,

and that they take this fact into consideration in arriving at a dollar value of one's injuries.'

[5] Clearly the District Court applied the standard applicable to consideration and disposition of a motion for a directed verdict or for a judgment n. o. v., rather than the one applicable to consideration and disposition of a motion to set aside the verdict and grant a new trial. As stated in the widely cited, quoted and followed case of Aetna Cas. & Sur. Co. v. Yeatts, supra [122 F. 2d 352],

> 'The motion to set aside the verdict and grant a new trial was a matter of federal procedure, governed by Rule of Civil Procedure 59 and not subject in any way to the rules of state practice. On such a motion it is the duty of the judge to set aside the verdict and grant a new trial, if he is of opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict. The exercise of this power is not in derogation of the right of trial by jury but is one of the historic safeguards of that right.'

The distinction between the governing standard in considering a motion to direct a verdict (or for a judgment n. o. v.) and that in considering a motion to grant a new trial was clearly stated in the case of Felton v. Spiro, 6 Cir., 1897, 78 F. 576, 582, and quoted with approval in General American Life Ins. Co. v. Central Nat. Bank of Cleveland, supra, 136 F. 2d at page 823, as follows:

> '* * *, the mental process in deciding a motion to direct a verdict is very different from that used in deciding a motion to set aside a verdict as against the weight of evidence. In the former there is no weighing of plaintiff's evidence with defendant's.

> It is only an examination into the sufficiency of plaintiff's evidence to support a burden, ignoring defendant's evidence. In the latter, it is always a comparison of opposing proofs.'

In passing upon the motion for a new trial and in considering the evidence in the light most favorable to the plaintiff, the trial court applied the standard applicable to a motion for a directed verdict or judgment n. o. v., rather than exercising his own independent judgment after a weighing of *all* the evidence and any other pertinent factors in determining whether the verdict was against the clear weight of the evidence or would result in a miscarriage of justice. See the discussion by Judge Sobeloff concerning this distinction in McCracken v. Richmond, F. & P. R. Co., 4 Cir., 1957, 240 F. 2d 484, 488. See also Snead v. New York Cent. R. Co., 4 Cir., 1954, 216 F. 2d 169; Hawkins v. Sims, 4 Cir., 1943, 137 F. 2d 66; Roedegir v. Phillips, 4 Cir., 1936, 85 F. 2d 995; Garrison v. United States, 4 Cir., 1932, 62 F. 2d 41. As was held in the case of Magee v. General Motors Corp., 3 Cir., 1954, 213 F. 2d 899, the application of the wrong standard in the disposition of the motion for a new trial amounted to an abdication of the judge's function with respect to that motion.

The case is accordingly remanded for reconsideration of the motion to set aside the verdict and for a new trial, not in the light most favorable to the plaintiff, but according to the analysis and appraisal by the *trial court* of the weight of all the evidence, considering also any other relevant factors."

The case at Bar is directly in line with and governed by the undisputed rule laid down in *Turner* v. *United States*, 229 F. 2d 944. That case originating in the Federal District Court for the Eastern District of Tennessee involved a suit between the wife and the mother of a deceased war veteran to determine who was the beneficiary

of certain government insurance. The case was tried before a jury which returned a verdict in favor of the mother. The trial Court set aside the verdict and granted a new trial. On appeal the Sixth Circuit Court of Appeals affirmed.

> "The controlling question is whether the order of the District Court granting a new trial constituted a clear abuse of discretion. *Washington Times Company* v. *Bonner,* 66 App. D. C. 280, 86 F. 2d 836, 848, 110 A.L.R. 393; *Kansas City Stockyards Company of Maine* v. *Anderson,* 8 Cir., 199 F. 2d 91, 95, 36 A.L.R. 2d 1; *Spero-Nelson* v. *Brown,* 6 Cir., 175 F. 2d 86, 89; *United States* v. *Johnson,* 327 U. S. 106, 112-113, 66 S. Ct. 464, 90 L. ed. 562. It was held in the Spero-Nelson case that where the jury's verdict resolves a factual question the trial court's action in overruling such motion cannot be reviewed by the Court of Appeals unless it involves an abuse of discretion. The granting or refusing of a new trial is a matter resting in the sound discretion of the trial judge and his action thereon is not reviewable upon appeal save in the most exceptional circumstances. *Aetna Casualty & Surety Co.* v. *Yeatts,* 4 Cir., 122 F. 2d 350-354. We therefore are concerned only as to whether the District Court clearly abused its discretion in granting the new trial. *Cf. Hill* v. *Pennsylvania Greyhound Lines, Inc.,* 3 Cir., 174 F. 2d 171, 172. An appellate court reviewing an order granting a new trial will consider all intendments in favor of the order made by the trial judge. The order will not be reversed if the record discloses any tenable ground in support of the order. *Cicrich* v. *State Industrial Accident Commission,* 143 Or. 627, 635, 636, 23 P. 2d 534. . . .

"As declared by the Fourth Circuit in *Aetna Casualty & Surety Co.* v. *Yeatts,* supra, 122 F. 2d at page 352, Judge Parker writing the opinion:

'It is the duty of the judge to set aside the verdict and grant a new trial, if he is of the opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice. . . .' "

Any technical argument concerning the insufficiency of the respondents' motion of May 28, 1962, which was characterized by the trial Court as containing "every combination of words known to the form books", is without merit. Patently, same was clearly sufficient both as to the weight of the evidence and as to highly prejudicial misconduct of the petitioner's counsel. This motion abundantly meets the test that:

"Thus, it is readily discernible that the language of the motion and subsequent order need not be identical but only reasonably synonymic to be responsive. See also *General Motors Corp.* v. *Perry,* 303 F. 2d 544 (7th Cir. 1962) and *Cooper* v. *Midwest Feed Products Co.,* 271 F. 2d 177 (8th Cir. 1959)."

Lack Industries, Inc., v. *Ralston Purina Co.,* 327 F. 2d 266 (1964).

Lebeck v. *William A. Jarvis, Inc.,* 250 F. 2d 285.

General Motors Corp. v. *Perry,* 303 F. 2d 544 (1962).

In the case at Bar the trial Judge exercised his discretion, granted a new trial because:

1. The verdict was against the overwhelming weight of the evidence on the issue of fraud, false swearing, willful concealment and misrepresentation.

2. The verdict was against the overwhelming weight of the evidence on the issue of the felonious burning of the warehouse.

3. Of the persistent misconduct of counsel representing the plaintiff.

This discretionary action of the trial Court is not reviewable except for manifest abuse of discretion which is clearly not present in the case at Bar.

CONCLUSION

Petitioner's testator was the insured under various policies of insurance issued on a grain warehouse. He filed a proof of loss. Respondents investigated and determined not to pay the claim because in their judgment the insured was guilty of fraud, false swearing, willful concealment, misrepresentation and arson. The case was tried. The jury found the insured guilty of fraud, false swearing, willful concealment and misrepresentation as to the policies insuring the contents of the mill. The same jury returned a verdict in favor of the petitioner on the policies insuring buildings and machinery. Respondents moved for judgment notwithstanding the verdict and for a new trial. The trial Court granted both motions. One of the primary reasons for granting the motion for judgment notwithstanding the verdict as to building and machinery items rested in the fact that the petitioner admitted on the trial of the cause that the principal grain storage facility described in the proof of loss was in reality less than one-third the size set forth in the proof of loss. (Append. 32b, 39b-40b, 60b). In the absence of this inflated grain bin the proof showed without question that the grain storage facilities of the mill to their utmost

capacity could not hold anywhere near the amount of grain which the proof of loss indicated to have been located in the mill. (Pl. Ex. 2, Append. 33b-36b). As to the motion for a new trial, the Court was convinced:

1. That the verdict was against the overwhelming weight of the evidence on both arson and fraud.

2. That the persistent misconduct of the petitioner's counsel required a new trial.

The petitioner appealed and the United States Circuit Court of Appeals for the Sixth Circuit set aside the judgment notwithstanding the verdict and sustained the motion granting a new trial. The petitioner asked for a rehearing, which was denied, and then filed this petition. At the end of its petition, the petitioner states that the judgment of the Court of Appeals is in conflict with:

"(a) Applicable decisions of this Court;"

WHAT DECISIONS?

It further says:

"(b) That it has decided an important question arising under the Rules of Civil Procedure adopted by this Court to govern the practice in the District Court which has not been, but should be settled by this Court;"

WHAT QUESTION?

It further says:

"(c) That it has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision."

WHAT DEPARTURE?

Respondents aver that the application for a writ of certiorari should be denied.

Respectfully submitted,

LON P. MACFARLAND
Middle Tennessee Bank Bldg
Columbia, Tennessee

WILLIAM B. CAIN
Middle Tennessee Bank Bldg.
Columbia, Tennessee

JOE W. HENRY, JR.
112 South First
Pulaski, Tennessee

D. C. LEE
First National Bank Bldg.
Pulaski, Tennessee

Attorneys for Respondents

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 757.

HELEN CORINNE SCALES TRICE, Executrix,
Petitioner,

vs.

COMMERCIAL UNION ASSURANCE COMPANY,
LTD., et al.,
Respondents.

SUPPLEMENTAL AND REPLY BRIEF ON BEHALF OF HELEN CORINNE SCALES TRICE, EXECUTRIX, PETITIONER.

FYKE FARMER,
1111 American Trust Building,
Nashville, Tennessee 37201,
Attorney for Petitioner.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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May It Please the Court:

Respondents in their brief in opposition to the grant of certiorari say that the trial judge exercised his discretion to grant a new trial because of "the persistent misconduct of counsel representing the plaintiff." At page **692** of **213 F. Supp.** appears the judge's statement of what he considered improper conduct on the part of counsel for petitioner, who signs this brief. The gist of the finding is that it was wrong for petitioner and her counsel to

interview James Nelson, whose deposition had been taken by the defendant insurance companies, and take a statement from him repudiating the testimony he had given.

The judge's statement fails to show that petitioner and her counsel used any improper means to cause Nelson to repudiate his testimony previously given by deposition. The defendants called him to the witness stand and were allowed to subject him to merciless cross-examination before the jury. Petitioner and her counsel, by going to Nelson and taking the statement from him, brought out the truth and exposed the improper means which had been used by the defendants to get him to make a confession that he had set fire to the mill. The jury so found.

The judge, having the last word, said the jury in believing Nelson's testimony on the stand acted capriciously and set their verdict aside. He sent his opinion to West Publishing Company to be published. Thus, he put an aspersion on petitioner's counsel that will remain in the law books for all time to come.

The Court of Appeals by refusing to pass on questions raised by petitioner on her appeal let the decision and opinion of the judge stand unreversed.

Now, petitioner and her counsel can only hope for justice from this high Court. They realize that this Court cannot undertake to remedy every injustice that is brought up before it. Here, however, the judicial wrong to an officer of the court is a wrong to the court itself. It tends to undermine the jury system which is one of the main bulwarks of liberty in this country. It is a wrong of such nature as will have repercussions in generations to come.

The judge, in his 29-page opinion, left out facts that put the conduct of petitioner's counsel in an entirely different light. Instead of the evidence being overwhelm-

ingly **against** the verdict, it was overwhelmingly **in support of** the verdict.

Petitioner has refrained from attacking opposing counsel. The animadversion upon her counsel in the judge's opinion and the use made of it in the brief of the insurance companies in this Court surely justify her in stating the facts about the case.

THE FACTS.

The insurance companies, having made their election to defend the action by setting up the defenses of false swearing in the proof of loss and intentional burning of the mill by the insured Joe W. Scales, carried the burden of proving their allegations by a preponderance of the evidence. After the death of Joe W. Scales and nearly three years after their answers alleging that he procured the mill to be burned, they turned up the evidence, which they thought would enable them to carry their burden.

In the Wales community where petitioner's family resided and where the mill was located there was a man named R. C. Jones. Petitioner and her sister and brother held a mortgage on the house in which Jones and wife lived. It was in default. Jones filed a huge claim against the Estate of Joe W. Scales that he could not substantiate. Petitioner and her sister and brother filed suit to foreclose their mortgage. The litigation went to the Supreme Court of Tennessee resulting in Jones losing. He and wife after the foreclosure sale had to move out of the house.

In this situation, the defendants' lawyers contacted Jones through whom (and with the assistance of his brother-in-law, who was the sheriff of the county) they succeeded in getting James Nelson, an illiterate Negro farm hand, to give them a statement on a wire recorder

that he took part in burning the mill. Then they took Nelson's deposition.

The story told by Nelson was incredible: By prearrangement of Mr. Scales, and Jones, so the story went, he and a white man entered the mill after dark. It was in hot weather, July 14, 1956. In the mill awaiting them they found some bales of hay and six or seven ten-gallon milk cans of gasoline. They broke the bales of hay and spread it around. Next they emptied the milk cans and put the gasoline around over the hay. They waited 15 minutes. Then, they turned the switch to start the conveyer and each struck a match to the gasoline. When the fire was well started, they walked out the door they came in, unharmed. Petitioner believes it may be safely asserted that the only other operation of this kind of record is when Shadrach, Meshach and Abenego walked in the fiery furnace. The souls of the Buddhist priests of South Vietnam who chose gasoline and matches as a certain means of suicide testify from heaven against such an occurrence.

Defendants' lawyers gave Nelson's statement to an assistant state prosecuting attorney. The grand jury indicted Nelson and two white men, Arthur Watts and Lewis E. Hewgley, charging them with arson. While the indictment was being returned, the defendants were taking Nelson's deposition for use in this case.

Petitioner and her counsel were at a loss to understand why Nelson would tell such a fantastic tale, resulting as it did in his own indictment for arson. They decided to go to see the people Nelson worked for and try to find out more about the matter. On this occasion Nelson, upon the urging of the people for whom he worked, told why he first made the statements to the defendants' lawyer confessing to burning the mill.

JAMES NELSON'S STATEMENT.

James Nelson's statement, which the judge held it was wrong for petitioner and her counsel to take, is as follows:

Statement of James Nelson.

I, James Nelson, make the following statement on March 22, 1960 at the home of Mr. and Mrs. Jones Boyd in the presence of Mr. and Mrs. Boyd, Mrs. Helen Scales Trice and Mr. Fyke Farmer.

Mr. Farmer has showed me a copy of an indictment against me, Mr. Lewis Hewgley and Mr. Arthur Watts for setting fire to and burning the mill property of Mr. Joe Scales on July 14, 1956. Mrs. Jones Boyd has read the indictment to me and explained the matter to me.

On March 1, 1960, Sheriff Butler came down to my home on the farm of Mr. Roy McRee, father of Mrs. Boyd, and I was not at home so he didn't see me. He left word with my wife for me to go over to Pulaski the next day. I went over to Pulaski the next morning and saw Sheriff Butler in front of the court house door and he told me to go to the office of Mr. Clayton Lee. I was going through the courthouse to go out the north door and someone called me. I looked around and it was Mr. Lee. Mr. Lee told me to go with him into "this little room" in the courthouse. I went into the little room with him and he shut the door and commenced asking me questions. He asked me where I stayed and what I was doing. Then he asked me if I knew Mr. Joe Scales. I told him I did. Then he asked me if I knew anything about the mill burning and I told him I didn't. Then he said, "Aw, come on, I've been told all about it." I just sat there and looked at him. Then he said, "You might as well tell it, how you and Arthur Watts got in there and every-

thing." I told him I didn't know Arthur Watts, that I had never seen Arthur Watts, if I did I didn't know him. Then he said, "You ought to know him, since you and him burnt the mill". I didn't say anything. He sat there a few minutes and said, "Where was you at the 14th of July, that night." I said, "I don't know, sir, I guess I was at home." He said, "Are you right sure?" I said, "I guess so." Then he said, "Wait there just a minute, I'll be back." He went out and I sat there a few minutes and waited on him. In a few minutes he came back with some kind of a machine in a case. He opened it up and after he had punched some buttons around and had got it fixed, he started asking me questions. He started telling me what he wanted me to say and would ask me to repeat it. When I did he would turn the machine on. Then he would go to something else and have me repeat that and when I did he would turn the machine on to take it down.

Mr. Lee made up the whole story about Mr. Scales meeting me in town on Saturday morning and telling me the mill just had to be burned and that he wanted me to do it and would give me $50.00 to burn it, about me going out to Mr. Jones and Mr. Jones taking me in his station wagon down on the Wales Road where we met two other men in a station wagon and me driving off with one of these men, about me and this man going out to the mill after dark, breaking bales of hay and spreading hay around, about there being milk cans of gasoline there which we poured on the hay and around on the floor and starting the elevator and then me striking a match and the white man striking a match to start a fire and then going back over town and the white man giving me $50.00. All this was made up by Mr. Lee and he would ask his questions into the machine and then cut it off until I repeated the answer he wanted me to give and turning

the machine back on to take it down, like he wanted it. He told me, to go ahead and repeat what he said because it didn't amount to anything.

After a while he called another man in and went over all these questions and answers while the other man was listening. While the other man was there he didn't cut the machine on and off. Mr. Lee never did tell me what he was going to do with what he had taken down on the machine. He just told me it didn't amount to anything. When he let me go it was way up in the morning. Mr. Lee said, "That's fine, I'll see you."

On the following Saturday, Mr. Lee came down to Mr. McRee's place and saw me about sundown in Mr. McRee's barn lot. He talked around a while and then asked me when I was going to Pulaski. I told him if the weather was bad so I couldn't work I might get over there. (I don't go to Pulaski very often.) On the next Tuesday the snow was on the ground and I caught a ride and went over to Pulaski. I went to the courthouse and as I was leaving through one door I met Mr. Lee coming in the door. Mr. Lee spoke to me and said, "What are you doing?" I said, "Not anything." He asked me if I could go to Nashville with him. I said I could. He said, "Let's go." His car was parked in the square. We got in it and he went to his home to get his wife. Then I rode to Nashville with Mr. Lee and his wife. He didn't tell me what he wanted me to go to Nashville for. He just said we wouldn't be gone long. When we got to Nashville he took me to a big building near the capitol. He left me in a little office by myself for sometime. Mr. Lee walked out in the hall with some other men. When Mr. Lee came back, he said, "It ain't going to be long now. They'll be here with that other man in a few minutes." We waited around for a long time. Finally

he took me upstairs to another office and pointed out the window. He told me what kind of car it would be. When two men got out of the car, he said, "Ain't that the man?" I said, "I don't know." He said, "You know that is the man, you might as well repeat it, there ain't going to be nothing to it." Then we went back to where we had been and Mr. Lee put me back in the little room. He left me there for a while. Then he came and took me into the room where the other man we had seen from upstairs window was with several other men were. Mr. Lee said to me, "Ain't that the man." I said, "Yes, sir, that is the man I seen getting out of the car." He said, "that ain't what I am talking about." He said, "You know that's Arthur Watts." I said, "If you say it is, but I don't know the man." Then they asked the white man if he knew me. He said he didn't. They told him, "Yeah, you know him, you might as well come on and tell the truth about it, we are trying to help you." They told Mr. Watts that his wife had said they were in one picture show and he had said they were in another. Then they took me back to the little room and directly Mr. Lee came and took me home. Mr. Lee brought me all the way to my home, about 14 miles south of Pulaski. We got here about 6. I was over in Pulaski on Monday, March 14th. My brother's trial was to come up that day. I saw Mr. Lee around the courthouse and he talked to me about my brother's trial. After my brother's trial was put off, Mr. Lee asked me who was his lawyer and said if he knew he might talk to him. I told him I didn't know who was his lawyer as I didn't see him very often since I lived way down at Stella. Mr. Lee then told me he wanted me to come back on Wednesday about one o'clock. I went back on Wednesday because I thought he might help my brother and might take his case. He took me over to the courthouse without telling me they were going to

take a deposition from me. I am unable to read and write.

s/ James Nelson

Witness: s/ Helen Scales Trice, Mrs. Jones Boyd, Jones Body, Fyke Farmer.

Sworn to and subscribed before me by James Nelson on March 22, 1960.

s/ Helen Scales Trice,
Notary Public.

Petitioner, her counsel, and Mr. and Mrs. Boyd, on the same afternoon Nelson made the repudiation of his confession carried him to see the District Attorney General. Nelson told him the statement defendants' lawyer had obtained from him was not true and that the statement he had made that afternoon was true.

Hewgley and Watts, the two white men indicted with Nelson, denied any knowledge of how the fire occurred.

Two or three days after Nelson recanted, one of defendant's lawyers accompanied by the sheriff called on James Nelson. The sheriff told him if he didn't go on and say that he burned the mill, they would put him in the penitentiary. Subsequently, a deputy sheriff and a criminal investigator for the state called on him and he signed for them a statement repudiating his recantation.

THE INDICTMENT DISMISSED.

The District Attorney General, after he learned the facts, nolled the indictment against all three defendants. This was done before the trial of this case.

THE INTIMIDATION OF JAMES NELSON.

On Friday before the Monday on which the trial of this case was to commence, two of defendants' lawyers went down to see James Nelson. According to Nelson, they told him, "You are going to have to own up to this. Because, if you don't, they are going to put you in the penitentiary." He was corroborated by Mr. Roy McCree, the 78-year-old white owner of the farm where Nelson worked who said the conversation occurred on his back porch.

Defendants' counsel, Mr. Lee, admitted that he, accompanied by Mr. McFarland, went down to Mr. McCree's where James Nelson worked on Friday before the date of the trial and pointed out to him the penalty of perjury. His testimony was:

> "Q. He was told that?
>
> A. Yes, siree.
>
> Q. Now, did any of you or either of you threaten to put him in the penitentiary or was it an explanation of the consequences of coming into Court and uttering false, dishonest and perjured testimony?
>
> A. That's right."

NELSON'S TESTIMONY ON THE TRIAL.

Although the defendants' cross-examination of Nelson on the witness stand trying to make him "own up to it" extended over two days, Nelson did not break, but maintained his innocence. He told the jury that the statement he gave to petitioner and her counsel was true.

James Nelson, on the witness stand, testified:

> "Q. Did you have some conversation with Mr. Jones Boyd after Mrs. Trice and I were down there about this statement?

A. Yes, sir.

Q. About the mill burning?

A. Yes. sir.

Q. What did you tell him James?

A. Well, I just went over there and told him what they were trying to fish me up into.

Q. Told him what?

A. I just went over there and told him what they were trying to get me into and I told him what Mr. Butler (the sheriff) said about the trouble. And so I just told him that I burnt the mill because I told him why because they had me scared and I didn't know what to do.

. . . . . .

Q. Why was you scared?

A. Everytime I looked out, two or three different mens coming; and I didn't know what they were going to do. They have the law with them. And I didn't know what they were going to do to me.

. . . . . .

Q. Did they or not have guns on them when they came down there?

A. Yes, sir.

Q. Do you know how many times, how many different occasions officers of the law or the lawyers came down there to see you?

A. No, sir, I don't know just how many times. They used to come regularly. They used to come regularly down there to see me.

. . . . . .

Q. Now, you said here what date was it recently that Mr. MacFarland and Mr. Lee came down there?

A. They come on Friday. I believe it would be two weeks ago, the last time they was down there.

. . . . . .

Q. Did you admit that you burned the mill?

A. Well, that is what he told me I had to do and I didn't know. After he said he was going to put me in the pen.

. . . . . .

Q. You said you were afraid when they told you that you would have to confess up to it or go to the penitentiary?

A. Yes, sir.

Q. Did you believe that?

A. Well, I didn't—I just didn't know.

Q. You say you are afraid of the law?

A. Yes, sir.

Q. Are you afraid of sheriffs?

A. Yes, sir."

OTHER WITNESSES WHO TESTIFIED AND THE SHERIFF WHO DID NOT.

The Boyds testified to the circumstances under which James Nelson made the recantation statement to petitioner and her counsel—in their presence and in their home.

Defendants' attorney, Mr. Lee, testified that Nelson's confession to him was freely given. He denied that he monkeyed with the wire recorder to get the story made up. He put on a demonstration of a recording before the jury to prove that it could not have happened like Nelson said it did.

The sheriff was not called to testify. His discovery deposition taken by petitioner, however, was filed in the case. Upon his discovery deposition being taken it was revealed that the three lawyers representing the insurance companies went out to the sheriff's house one night and told him they had information that James Nelson had burned the mill and asked him if he couldn't get James

Nelson in to talk to them about it. The sheriff had J. D. Nelson, James Nelson's brother in jail. He was charged with murder. Mr. Henry, one of the three lawyers was defending J. D. Nelson, according to his statement made when the sheriff's deposition was taken. He also had represented the sheriff in litigation and in "one thing and another" more than any other lawyer at the Pulaski bar.

The day before J. D.'s murder case was to come up, the sheriff went down in the country where James lived and left word with "the colored folks next door" to tell James to come to Pulaski. James went up to Pulaski early the next morning. The sheriff took him back into a little room in the courthouse and "sat right back there and told him that his brother was in jail, his trial was set, and they didn't have a lawyer, and that if they didn't get a lawyer that his brother was going to the penitentiary."

After the sheriff finished talking to James about his brother's murder case, the sheriff said, "I told him that I had information that he knew something about this fire out here and if he did know, now's the time to talk, because Mr. Joe Scales was dead and he couldn't help him."

Nelson, the sheriff said, did not open his mouth to him but he left him sitting there and went out and told Mr. Henry that James was ready to talk. Then Mr. Lee came over to talk to Nelson in the little room in the courthouse.

R. C. Jones took the stand for the defendants. He tried to help them but testified that he drove over to town in the morning before the fire and brought Nelson out to his house where he saw Mr. Scales hand Nelson some money. This was in the morning. It conflicted with Nelson's statement on his deposition that he did not go out to Jones' house until late in the afternoon and that $50.00 was paid to him over in town by the white man he did not know

after they had set the fire. There were also other points of conflict between Jones' testimony and Nelson's version of the events on the recordings and in his deposition.

Petitioner, in rebuttal, called Watts and Hewgley, both of whom testified that they knew nothing about how the fire started.

Three defense witnesses—all experts in the fields of combustion and arson—upon cross-examination by petitioner's counsel gave testimony as to the improbability of the fire being started with gasoline and hay in the manner described by Nelson in Mr. Lee's wire recordings.

When the defendant's expert on combustion, Dr. F. A. Griffitts, was on the stand, plaintiff's counsel asked him on cross-examination and he answered as follows:

"Q. Liquid gasoline does not burn? It is the fumes or vapors from the gasoline which burns, isn't it Doctor?

A. Properly mixed with air.

Q. Gasoline itself will not ignite?

A. Right.

Q. And if you poured on the floor in a building here, one of these buildings here, on a hot summer night, milk cans of gasoline in one room; say, two, three, four, five, six or seven milk cans of gasoline in one room, you first spread hay around and some hay on the elevator belt; and then you got milk cans of gasoline and saturated the hay; and poured it all around the room; and then you stood in there and took a match and struck it, what would happen?

A. The man who struck the match would probably be pretty badly singed. Without any doubt. Just what would happen would be pretty hard for me to say. It would be pretty hard for anybody to say exactly what would happen unless they were there and saw it. If anybody——

Q. He would be singed because he would be in the fumes which were ignited by the striking of the match?

A. Probably so.

Mr. Farmer: That is all."

Tr. pp. 799-800.

Deputy State Fire Marshal Gray Ragsdale, witness for defendants, testified:

"Q. Have you had any experience in your investigation of investigating gasoline fires?

A. Yes, sir.

Q. What happens when you spread out gasoline on the floor and strike a match?

A. It explodes.

Mr. Farmer: Explodes. That is all."

Tr. p. 656.

Harry Avery, special investigator for National Board of Fire Underwriters, who was called by the defendants, testified that in his first comprehensive report on this fire, he reported that the fire started with a large amount of smoke and small light or flame:

"By Mr. Farmer:

Q. If you didn't say this. On Saturday night somewhere about nine o'clock, July 14, an unidentified woman who was driving down the Lawrenceburg highway stopped at a neighbor's home across the highway and advised that his property was on fire. A large amount of smoke and small light or flame could be observed at the time the fire was discovered. That is in your report, original report, isn't it?

A. Yes, sir.

Q. You have heard of a lot of fires caused by the use of gasoline in starting them?

A. Yes, sir. I have called on a lot of people who set fires, set themselves on fire; got badly burned themselves to death.

Q. Yes, sir, but you wouldn't want to pour out gasoline, large quantities of gasoline in a closed building on a hot summer night; milk cans of gasoline; and stand in the building and turn on a switch; put on hay in the first place; spread hay around and put gasoline all over the hay; and then turn on a switch and start a conveyor and then light a match to it and try to get out of that building alive?

A. I wouldn't want to pour out the gasoline anywhere myself."

Tr. pp. 721, 724.

The story about Nelson and a white accomplice setting the building on fire the way Mr. Lee had it on his wire recorded simply is an affront to common sense and reason. Everybody who has ridden in a commercial airlines airplane knows that the reason for the "No Smoking" sign is to prevent fumes from gasoline from being ignited. Everyone who has seen a gasoline truck with big letters "INFLAMMABLE" or "FLAMMABLE" knows that gasoline is a volatile liquid and the fumes from it are ignited by fire from matches, electric switches, etc., and the result is explosions and very dangerous fires. That is just about everybody in this country. Every child old enough to go to school knows better than to pour out gasoline and strike matches around where the fumes are. Realizing the predicament the defendant insurance companies had found themselves in, Mr. Henry of the defendants' counsel endeavored to get them "off the hook" with the jury. In his argument he said:

"We have the hay that had been placed in this crusher, and Ladies and Gentlemen, don't be deceived about this idiotic argument that they took those

milk cans and poured the gasoline right down in the floor, and stood there and struck a match. Of course that didn't happen and no one ever suggested that happened."

Tr. p. 1624.

Then Mr. Henry proceeded to outline a new theory about how the fire was started with gasoline and hay. He told the jury:

"The gasoline had to go around, it had to be put in a number of different places. The proof shows this building right here, I believe, is 200 feet long. I believe that is what the proof shows, I know it shows that, and it shows there is a back door right back here, we proved that by Mr. Gray Ragsdale.

"There is a conveyor belt there, and I—most of you gentlemen, at least, have been in mills, and know the speed with which conveyor belts move. I submit to you that lighted hay on a conveyor belt wouldn't travel as fast 200 feet as a man could walk away from it. He could have gotten anywhere he wanted to by the time that hay got down there, the lighted hay got down to the place where the gasoline was."

Tr. p. 1624.

Unfortunately for the defendants the record did not bear out his contention. Only the "idiotic" theory was attempted to be proven by the defendants. Nelson, cross-examined on his deposition, said that all their getting ready to set the fire was done in the same room where the milk cans were found, that this room was where the hay was spread and gassed, where the wooden bins were, that they set the fire around the woodwork in the east end of the room. He said they put the hay on the conveyor belt so that when it started rolling, some would

roll off and get started on the floor. The conveyor went west. They did not go into any other part of the building and went out the same door they came in (Dep. of James Nelson, pp. 86-94). In this deposition Nelson said they saw the hay was caught good before they left; that they were right at the door, not as far as eight or ten feet from it (Dep. of Nelson, p. 41).

Neither judges nor juries are bound by testimony that they do not believe. **Quock Tig v. U. S., 140 U. S. 417, 11 S. Ct. 733, 851, 35 L. Ed. 501; Atlantic Works v. Brady, 107 U. S. 192, 2 S. Ct. 225, 27 L. Ed. 438.** Courts will take judicial notice of matters of common knowledge.. **Ohio Bell Tel. Co. v. Public Utilities Com. of Ohio, 301 U. S. 292, 57 S. Ct. 724, 81 L. Ed. 1093; Milstead et al. v. Taylor et al., 186 Tenn. 642, 653; 31 C. J. S., Sec. 9, Evidence.**

Teasdale v. Beacon Oil Co., 266 Mass. 25, 164 N. E. 612 holds that it is a matter of common knowledge that gasoline is highly inflammable and that its contact with a spark is liable to result in "serious consequence."

The Tennessee Court of Appeals in Gatlinburg Const. Co. v. McKinney, 37 Tenn. App. 343, declared that it is a matter of common knowledge that the residue left in tanks used to store petroleum products is explosive. In that case a little boy was injured by dropping a lighted match down in an old empty gasoline tank. The tank exploded.

If the Pulaski Mill & Elevator Company fire on July 14, 1956 had been set by James Nelson and Arthur Watts by striking matches to gasoline and hay spread out like Mr. Lee had Nelson telling it, there would have been an explosion that would have blown the town of Pulaski into Kingdom Come. Furthermore, the Deputy Fire Marshal and the special investigator for National Board of Fire Underwriters when they arrived on the scene would have

found the blackened corpses of James Nelson and Arthur Watts inside the very room where the gasoline was poured around and where they struck the matches (after sitting around for fifteen minutes giving it ample time to fill the entire room with the vapor) looking like the remains of the bodies of those Buddhist priests over in South Vietnam.

But it was not claimed that Nelson was even singed. No evidence was introduced by these resourceful insurance companies to the effect that Watts was singed. Their customary thoroughness failed them at this point. This, of course, was a mere oversight, which Mr. Henry endeavored to cure before the jury in the manner indicated above —by changing the whole concoction.

The jury didn't believe this concoction. No member of this Court can believe it. The defendants' lawyers didn't believe it. Mr. Henry told the jury it was idiotic. And yet the trial judge elected to fill 30 pages of Vol. 213 Fed. Supp., with an "analysis associated with logic" from which the casual reader might possibly agree that the verdict of the jury was contrary to the great preponderance of the evidence! Instead of evaluating the evidence with subtlety and logic, he should have applied the simple standards of the ordinary reasonable man—the man in the street or digging in the ditches—standards of right, truth and honesty of mind and purpose. By the undisputed evidence of the defendants' own witnesses, Dr. Griffitts, Deputy State Fire Marshal Ragsdale, and National Board of Fire Underwriters special investigator Avery the out-of-court "confessions" of James Nelson were—well in the words of Mr. Henry for the defendant insurance companies—"idiotic."

THE JURY VERDICT AND JUDGMENT THEREON.

An all white jury composed of eleven men and one woman disbelieved Jones and Lee and believed Nelson told the truth on the witness stand rather than on the wire recording taken by Mr. Lee after the sheriff had turned Nelson over to him.

The verdict was returned May 18, 1962. One week later judgment was entered on the verdict. On July 23, 1962 notation was made on the docket by the clerk that, in pursuance to order entered by the court on that date:

> 7-23-62 "Order entered by Judge Frank Gray, Jr., ordering that the judgment entered May 25, 1962, in favor of the United States Fidelity and Guaranty Company and the Insurance Company of North America be, and it is hereby, approved, and the judgment in favor of Helen Corinne Scales Trice, executrix of the will of Joe W. Scales, deceased, be and it is hereby, amended to read as follows:
>
> "Judgment is hereby entered as of May 25, 1962, that the plaintiff, Helen Corinne Scales Trice, executrix of the will of Joe W. Scales, deceased, have and recover of the defendants, Commercial Union Assurance Company, Limited; American National Fire Insurance Company; North British and Mercantile Insurance Company, Limited; New Hampshire Fire Insurance Company; Citizens Insurance Company of New Jersey; Queen Insurance Company of America, and the Home Insurance Company, the sum of $45,000.00 together with interest thereon from June 19, 1957, in the sum of $13,320.00, making a total sum of $58,-320.00, but the defendants shall be entitled to credit against this judgment for all sums paid Thurman Smith, individually or as trustee for the Union Bank of Pulaski, Tennessee, or to the Union Bank of Pu-

laski, Tennessee, on the indebtedness constituting a lien on the property of the plaintiff's testator subject to the mortgage clauses of the defendants' policies. The costs shall be taxed one-fifth against the plaintiff, Helen Corinne Scales Trice, and four-fifths against the above-named defendants." (Attested copy mailed all counsel of record in this action.)

PETITIONER'S APPEAL—JURY VERDICT SET ASIDE.

After petitioner appealed from the portion of the judgment giving the defendants the credit thereon, the judge on December 20, 1962 entered an order setting the verdict aside (seven months after the jury returned the verdict). The judge in his memorandum published in **213 F. Supp., at page 692,** said:

> "The jury could not have been so capricious as to believe Nelson's testimony on the stand, and it was precluded from accepting the reading of his prior deposition during his examination as substantive proof."

What then constituted the "great preponderance" of the evidence against the verdict? We read in the judge's opinion:

> "Considered together, all of Nelson's actions and statements prior to the trial are almost conclusive on reasonable minds that Nelson took part in setting fire to the mill, and it needs only slight corroboration to be utterly convincing that Scales hired him to do it. Such corroboration is abundant, not only in those portions of R. C. Jones' story that are additionally corroborated by Mrs. Jones, but by the massive uncontradicted circumstantial evidence against Scales."

But then, the judge goes on to state:

> "Jones, of course, was seriously discredited by the nature of his own testimony, and by his admitted hos-

tility to Mrs. Trice, and by the obviously good reasons he had for that hostility."[1]

To make entirely plain his reasons for thinking that the weight of the evidence was against the jury's verdict, the judge proceeded to state:

> "Even if the arson issue had to be decided only on the basis of Jones' testimony in court and Nelson's established out-of-court statements versus the plaintiff's rebuttal witnesses, a jury verdict for the defendants would have been fully supported."

One of the circumstances constituting the "massive uncontradicted evidence against Scales", in the judge's opinion, was that the property was **underinsured.** This was a situation, in the mind of the judge, which "was clearly one in which arson could have been profitable"! Some 26 other circumstances were enumerated by the judge, such as:

> "14. Scales was attending a movie at a near-by drive-in theater when the fire broke out, was notified of the fire by the manager, and went immediately to Pulaski to post the $50.00 guarantee required by the city fire department before making fire runs beyond the city limits.
>
> 15. Firemen arrived at the plant expecting to find a source of water in an old basement they had used for that purpose previously and found the basement had been filled in."

Circumstantial "evidence" of this sort, together with the out-of-court statements of James Nelson and the corroboration of these out-of-court statements by Jones, an impeached witness, but who was corroborated to some ex-

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[1] Mrs. Trice, by court decree, had foreclosed the mortgage on the Jones' home, after he had carried his litigation to the State Supreme Court. No other reason for his hostility was shown.

tent by his wife, constituted evidence tending to establish arson, in the judge's opinion, "so ponderous and so slightly rebutted that the jury's verdict cannot be allowed to stand."

To justify his action and to fortify his conclusion that James Nelson's out-of-court statements outweighed his testimony on the witness stand the judge found that Nelson's repudiation was improperly obtained by petitioner and her counsel.

The defendants' lawyers described the methods they used to get testimony for their case when Mr. Lee was on the witness stand being examined by Mr. Henry:

> "Q. Let me clear up one or two things right there, now that have troubled Mr. Farmer for these months and months. It has been suggested there that in a subsequent conversation there with Arthur Watts that we attempted to put the heat on Arthur Watts. Now, Mr. Lee, I want you to tell the Court and jury just exactly what I told Arthur Watts which comes nearer to being heat than anything put on him that day. Tell this jury what I told Arthur Watts.
>
> A. The best I recall it went something like this. You asked Arthur Watts was he ready to shell down the corn? If he didn't, did he want us to go to the Grand Jury or something to that effect.
>
> Q. I asked him, 'Are you ready to shell down the corn or do you want us to go to the Grand Jury?' Beyond that statement made by me, was there any pressure or heat or coercion or threat made against this man, Arthur Watts?
>
> A. Not that I know of.
>
> Q. Now, in all fairness, Arthur Watts never cracked, did he?
>
> A. He did not. He denied that he was involved in it. He denied that he knew James Nelson."

From the face of his opinion it would seem that the judge considered Watt's denials as having no weight whatsoever for, following his sweeping disposition of plaintiff's "impressive array of undependable witnesses," he said:

> "Arthur Watts, whose stout and unbroken denial of guilt barely served to keep his name out of the above findings of fact as an arsonist **for failure of the hearsay declarations of an illiterate farm hand (James Nelson) to meet the defendants' burden of proof.**"

Since James Nelson, on the witness stand, told the jury that the first time he saw Arthur Watts was when Mr. Lee carried him to Nashville after he had taken the statement on the wire recorder at the courthouse in Pulaski, it seems that petitioner with perfect propriety may raise the question, Why were the hearsay declarations of James Nelson which failed to meet the defendants' burden of proof considered by the court as so slightly rebutted that the jury's verdict could not be allowed to stand?

CONDUCT OF PETITIONER'S COUNSEL PROPER.

Petitioner's counsel did not do wrong; he did right.

Justice Samuel F. Miller in the case of **In re Thomas et al. (C. C. D. Colo.), 362 Fed. 242**, declared:

> "The lawyer in this country is one of the administrators of justice. The judge who presides in the court is another, with more authority of position, and, perhaps, in some respects a more burdensome one. But the court, and the clerk, and the marshal, the sheriff, the jury, the lawyer, all constitute ministers of justice; and a lawyer who consciously undertakes to thwart justice is unfit for the position, as much as the judge who accepts a bribe, or knowingly decides a case against the law and the right; and it

should be understood that they are subjected to the same responsibilities."

Further, in his opinion in the **Thomas case**, Justice Miller pointed out that the system of separation of the duties of an attorney and a counselor has not prevailed in this country as in England. He said those admitted to the bar are often sworn in as attorneys and counselors both and perform the functions of both; and so the lawyer is often compelled for himself to have interviews with his own witnesses to ascertain what they will testify to in the matter. He said:

". . .; and in the same way he must seek, either from his client or somebody else, to know what will be the case against him."

By canon 39 of Canons of Professional Ethics of the American Bar Association is as provided:

"39. Witnesses.

A lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of opposing counsel or party. In doing so, however, he should scrupulously avoid any suggestion calculated to induce the witness to suppress or deviate from the truth, or in any degree to affect his free and untrammeled conduct when appearing at the trial or on the witness stand."

American Jurisprudence 2d, Desk Book, p. 232.

The United States Court of Appeals for the Eighth Circuit in **Harrington et al. v. United States 267 Fed. 97, 101** declared:

"There was evidence to show that Scattergood called on Mrs. Pittman at Creston, Iowa, and endeavored to have her make a statement in writing,

before a notary public, which would contradict what she had said before the grand jury; but there was no evidence tending to show that Scattergood was consciously attempting to obtain a statement of a falsehood. The contents or substance of the statement which Scattergood solicited Mrs. Pittman to make and sign are not disclosed, except that it would be contradictory of her testimony given before the grand jury. Even though Mrs. Pittman had testified before the grand jury to facts that would have shown Anderson guilty of a crime under the White Slave Act, it was Scattergood's privilege to disbelieve her, and to believe the version of the facts told by his client, Anderson, and to so believe, although she maintained that she had told the truth. **It is not an unlawful attempt to influence or impede a witness, or the due administration of justice, for one to seek to obtain from a witness a statement of the facts as he believes them to be, without the exercise of undue influence, even though such a statement may conflict with prior testimony given by the one making the statement.** Such an effort is not regarded with favor, because of the temptation to influence the witness unduly; but the mere request for a statement believed to be true does not offend against the statute under which this indictment was drawn, because it is not corrupt conduct." (Emphasis added.)

Was it improper for petitioner's counsel to inform James Nelson that he had been indicted for arson on the statement defendants' attorney had obtained from him? Mr. Lee was listed as a state's witness on the back of the indictment. Mr. Lee denied that he went before the grand jury. James Nelson testified that Mr. Lee did not tell him what he was going to do with what he was taking down on the machine. "He just told me," he testified, "that it didn't amount to anything."

Counsel for the insurance companies tried to make James Nelson say that petitioner's counsel, in typing the statement down at the home of Mr. and Mrs. Jones Boyd, put words in his mouth. James Nelson denied this. He said the statement contained exactly what he said and that petitioner's counsel did not tell him what to say. Mr. and Mrs. Boyd corroborated him in every respect. Defendants' counsel, upon the discovery deposition of Sheriff Butler being taken, proved by him that Mr. and Mrs. Boyd were upright, honorable people.

Therefore, although the judge found that petitioner's counsel's conduct was improper, he found no facts which would render it improper. His conclusion is not warranted by the facts found.

It was misconduct, in the eyes of the judge, for petitioner's counsel to call for a resumption of the deposition of James Nelson without telling opposing counsel that Nelson had changed his story. Defendants' counsel, however, did not claim that they were misled. They did not claim that they did not learn immediately after James signing the recantation statement and his visit to the District Attorney General that he had recanted. It was shown that within two or three days after Nelson's recantation, one of defendants' attorneys and the sheriff were back down to see him and the sheriff told him he had better say he burned the mill for if he did not they would send him to the penitentiary.

The judge, in his opinion, declared:

> "This conduct was improper, whether knowingly so or not, and in view of the very strong case of arson made out by the defendants by other evidence, the court cannot say that the results of this improper conduct did not gain his client an unfair advantage that resulted in the jury's verdict against the defendants on the arson issue.

"Accordingly, prejudice has clearly been shown. The verdict must therefore be set aside and a new trial granted on the issues of arson and the good or bad faith of the plaintiff.

"It will not be necessary to discuss here the other allegations relating to the conduct of the plaintiff's counsel on the trial, but the court deems it pertinent to discuss in this context a matter brought up by plaintiff's counsel in one of his post-trial briefs."

One of the grounds of the defendants' motion for a new trial was:

"17. The persistent misconduct of the counsel for the plaintiff, Helen Scales Trice, Executrix, in frequent and consistent mis-statements of fact and proof to the jury operated to the prejudice of these defendants and in favor of the plaintiff."

The motion for a new trial contains no specification of this "persistent misconduct of counsel for plaintiff." The judge supplied that deficiency apparently by finding a mis-statement in a post-trial brief.

And the Court of Appeals said they had examined the record and found no abuse of discretion by the trial judge since there was "substantial evidence in the record to the effect that the insured had been guilty of fraud and false swearing in procuring the burning of the subject property."

Petitioner, in her petition to rehear in the Court of Appeals challenged the foregoing statement by the Court of Appeals and demanded that the court give a specification of the "substantial evidence." The Court of Appeals answered merely: "Petition to Rehear Denied."

PETITIONER ASKS THIS COURT: WHERE HAS JUSTICE GONE, THAT SHE AND HER COUNSEL IS TREATED IN THIS MANNER?

The judge had before him as part of the record the discovery deposition of Pink Butler, the sheriff, in which he related how he softened up James Nelson back in the little room in the courthouse and then turned him over to defendants' attorneys telling them he was ready to talk, though James had not opened his mouth.

In the view of the judge, it was all right for the defendants' lawyers to have Arthur Watts brought into the office of the State Fire Marshal and ask him whether he was going to "shell out the corn" or whether he wanted them to go before the grand jury. (Which they did after he refused to "shell out the corn.") It was all right to obtain the friendly offices of the sheriff in obtaining a confession from James Nelson, while telling him it didn't amount to anything, and then use the confession as the basis for an indictment against him for arson. It was all right to use the sheriff again to go back to Nelson after he had repudiated the confession and tell him that if he didn't go on and say he burned the mill, "they" would put him in the penitentiary. It was all right for defendants' lawyers, after all the mistreatment of James to go down to see him again on the eve of the trial and remind him that the penalty of perjury in the Federal court was the penitentiary.

Judicial knowledge may be taken, we believe, of the fact that there is a type of mind in some states which considers the testimony of an illiterate Negro farm hand as weightless as an object in orbit in space if he is contradicting the word of a white lawyer. Be it said to the credit of Tennessee, however, that the jury which heard this case all had a different mind.

THE DOORS OF THE COURT OF JUSTICE BARRED.

Petitioner asks the Court to consider, for a moment, the judge's finding that the conduct of petitioner's counsel in taking the statement from James Nelson repudiating his confession may have gained petitioner "an unfair advantage that resulted in the jury's verdict against the defendants on the arson issue." Let us suppose the case is tried a second time and James Nelson is put on the stand by the defendants to prove that he at one time confessed to burning the mill but had repudiated his confession when petitioner and her counsel, with Mr. and Mrs. Boyd, talked to him. If the ruling of the judge on the first case is unreversed and it is urged that it has become the law of the case, would not the judge—even if it be a different judge from the one who tried the case the first time—set the second verdict for petitioner aside on the ground of her counsel's "misconduct" in taking the recantation from Nelson. Petitioner is afraid that unless this Court grants certiorari and corrects the erroneous ruling of the trial judge on this first appeal, the doors of the court below have been permanently closed to her.

LIND v. SCHENLEY INDUSTRIES, INC.

It seems to petitioner that the decision of the courts below is in conflict with the rule declared by the Court of Appeals for the Third Circuit in the leading case of **Lind v. Schenley Industries, Inc., 278 F. 2d 79, reversing 167 F. Supp. 590, cer. den. 364 U. S. 835, 81 S. Ct. 58, 5 L. ed. 60.** The rule laid down by the Court of Appeals for the Third Circuit in that case is that where the subject matter of the litigation is simple and easily comprehended by any intelligent layman and the case turns upon the credibility of the witnesses, the trial judge has no right

to substitute his judgment for that of the jury and therefore abuses his discretion in setting aside the verdict and granting a new trial.

Because of the great importance of the **Lind case**, we quote from the majority opinion as follows:

> [16] The remaining basis for ordering a new trial is that the verdict was against the weight of the evidence. It is frequently stated that a motion for a new trial on this ground ordinarily is nonreviewable because within the discretion of the trial court. Montgomery Ward & Co. v. Duncan, 1940, 311 U. S. 243, 251, 61 S. Ct. 189, 85 L. Ed. 147; Zegan v. Central R. Co., 3 Cir., 1959, 266 F. 2d 101; Menneti v. Evans Construction Co., 3 Cir., 1958, 259 F. 2d 367. But this discretion must still be exercised in accordance with ascertainable legal standards and if an appellate court is shown special or unusual circumstances which clearly indicate an abuse of discretion in that the trial court failed to apply correctly the proper standards, reversal is possible. See e. g. Indamer Corporation v. Crandon, 5 Cir., 1954, 217 F. 2d 391. Concededly appellate courts rarely find that the trial court abused its discretion.
>
> In Commercial Credit Corp. v. Pepper, 5 Cir., 1951, 187 F. 2d 71, 75-76, Judge Borah stated: "It is a principle well recorgnized in the federal courts that the granting or refusing of a new trial is a matter resting within the discretion of the trial court. The term 'discretion', however, when invoked as a guide to judicial action, means a sound discretion, exercised with regard to what is right and in the interests of justice. And an appellate court is not bound to stay its hand and place its stamp of approval on a case when it feels that injustice may result. Quite to the contrary, it is definitely recognized in numerous deci-

sions that an abuse of discretion is an exception to the rule that the granting or refusing of a new trial is not assignable as error." Thus an appellate court must still rule upon the propriety of an order for a new trial, even though the grounds for reversal are exceedingly narrow. But before any rational decision can be made, the reviewing court must know what standards the trial judge is bound to apply when ruling upon a motion for a new trial. These standards necessarily vary according to the grounds urged in support of the new trial. There is, however, little authority on what standards are to be applied in ruling on a motion for new trial on the grounds that the verdict is against the weight of the evidence beyond the simple maxim that the trial judge has wide discretion. The few available authorities are conflicting. Professor Moore concludes that while the trial judge has a responsibility for the result at least equal to that of the jury he should not set the verdict aside as contrary to the weight of the evidence and order a new trial simply because he would have come to a different conclusion if he were the trier of the facts. Professor Moore states in this connection: "[S]ince the credibility of witnesses is peculiarly for the jury it is an invasion of the jury's province to grant a new trial merely because the evidence was sharply in conflict. The trial judge, exercising a mature judicial discretion, should view the verdict in the overall setting of the trial; consider the character of the evidence and the complexity or simplicity of the legal principles which the jury was bound to apply to the facts, and abstain from interfering with the verdict unless it is quite clear that the jury has reached a seriously erroneous result. The judge's duty is essentially to see that there is no miscarriage of justice. If convinced that there has been then it is his duty to set the verdict aside; otherwise not."

Professor Moore's views are logical and persuasive and buttressed by some decisional authority. See Werthan Bag Corp. v. Agnew, 6 Cir., 1953, 202 F. 2d 119, 122 (question of damages). In the same vein, Schirra v. Delaware, L. & W. R. Co., D. C. M. D. Pa. 1952, 103 F. Supp. 812, 820, holds that if "there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion, and it is immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." Pelham v. Hendricks, D. C. M. D. Pa. 1955, 132 F. Supp. 774, 775, goes further, ruling that: "The evidence and inferences reasonably deducible therefrom must be viewed in the light most favorable to the prevailing party, and the Court must assure that the jury followed the Court's instructions."

Miller v. Pacific Mut. Life Ins. Co., D. C. W. D. Mich. 1954, 17 F. R. D. 121, 125; American Cooler Co. v. Fay & Scott, D. C. D. Me. 1937, 20 F. Supp. 782, 783, and United States v. 13.40 Acres of Land, D. C. N. D. Cal. 1944, 56 F. Supp. 535, 538, go farther in restricting the discretion of the trial judge for these authorities hold that the jury's verdict may not be set aside and a new trial ordered merely because the verdict is contrary to the preponderance of the evidence. The first and second of the three cases cited hold that the verdict "must be so manifestly and palpably against the evidence in the case as to compel the conclusion that the verdict is contrary to right and justice." And the third opinion cited states that a new trial may not be ordered unless, "The evidence as a whole, after according to it the highest probative force to which it is lawfully entitled, is insufficient to support the verdict." Judge Yankwich took a similar restricted view of his own discretion in ordering a new trial because the verdict was contrary to

the weight of the evidence. In Lyophile-Cryochem Corp. v. Cutter Laboratories, Inc., D. C. N. D. Cal. 1948, 78 F. Supp. 903, he recognized that a motion for a new trial may be granted if the trial judge is satisfied that the verdict was against the preponderance of the evidence but he took the position that the trial judge should not substitute his judgment on the facts for that of the jury except in extreme circumstances.

But there is also some authority supporting an almost unlimited discretion in the trial judge in granting or denying a motion for a new trial. In Murphy v. United States District Court for Northern District of California, Southern Division, 9 Cir., 1944, 145 F. 2d 1018, 1020, the Court of Appeals upheld the granting of a new trial by Judge Goodman in United States v. 13.40 Acres of Land, supra. The appellate court found the trial judge's discretion in such matters was wider than did Judge Goodman himself. The appellate tribunal said that "The granting of a new trial is discretionary with the court and subject to no fixed rule except a consideration of what is just." But the exception stated is itself a potent one. The case of Grayson v. Deal, D. C. N. D. Ala. 1949, 85 F. Supp. 431, stands for the proposition that the court may consider the evidence as a whole and weigh it, and if it considers that the jury was mistaken or that its verdict was wrong, although supported by evidence, a new trial should be granted.

What we have stated demonstrates that there is no consensus of opinion as to the exact standards to be used by a trial court in granting a new trial and that the criteria to be employed by an appellate tribunal charged with reviewing the trial judge's decision in this respect are equally indefinite. New trials granted because (1) a jury verdict is against the weight of the evidence may be sharply distinguished from (2) new

trials ordered for other reasons: for example, evidence improperly admitted, prejudicial statements by counsel, an improper charge to the jury or newly discovered evidence. In the first instance given it is the jury itself which fails properly to perform the functions confided to it by law. In the latter instances something occurred in the course of the trial which resulted or which may have resulted in the jury receiving a distorted, incorrect, or an incomplete view of the operative facts, or some undesirable element obtruded itself into the proceedings creating a condition whereby the giving of a just verdict was rendered difficult or impossible. In the latter instances, (2), supra, the trial court delivered the jury from a possibly erroneous verdict arising from circumstances over which the jury had no control. Under these conditions there is no usurpation by the court of the prime function of the jury as the trier of the facts and the trial judge necessarily must be allowed wide discretion in granting or refusing a new trial.

[17] But where no undesirable or pernicious element has occurred or been introduced into the trial and the trial judge nonetheless grants a new trial on the ground that the verdict was against the weight of the evidence. The trial judge in negating the jury's verdict has to some extent at least, substituted his judgment of the facts and the credibility of the witnesses for that of the jury. Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts. It then becomes the duty of the appellate tribunal to exercise a closer degree of scrutiny and supervision than is the case where a new trial is granted because of some undesirable or pernicious influence obtruding into the trial. Such a

close scrutiny is required in order to protect the litigants' right to jury trial.

[18] Where a trial is long and complicated and deals with a subject matter not lying within the ordinary knowledge of jurors a verdict should be scrutinized more closely by the trial judge than is necessary where the litigation deals with material which is familiar and simple, the evidence relating to ordinary commercial practices. An example of subject matter unfamiliar to a layman would be a case requiring a jury to pass upon the nature of an alleged newly discovered organic compound in an infringement action. See 3 Walker on Patents, Deller's ed., Section 697. A prime example of subject matter lying well within the comprehension of jurors is presented by the circumstances at bar.

[19] The subject matter of the litigation before us is simple and easily comprehended by any intelligent layman. The jury's main function was to determine the veracity of the witnesses: i. e., what testimony should be believed. If Lind's testimony and that of Mrs. Kennan, Kaufman's secretary, was deemed credible, Lind presented a convincing, indeed an overwhelming case. We must conclude that the jury did believe this testimony and that the court below substituted its judgment for that of the jury on this issue and thereby abused its legal discretion.

The judgment of the court below will be reversed and the case will be remanded with the direction to the court below to reinstate the verdict and judgment in favor of Lind.

There was a dissent by two of the judges of the Court of Appeals for the Third Circuit in the **Lind case**. Shepherd's Citations, however, shows that the rule of the case has been consistently and frequently applied since

that time in the district courts for Pennsylvania. These later district court decisions are:

Kowatch v. Rudnik (W. D. Pa.), 193 F. Supp. 466, 469;

Jamison v. Di Nardo, Inc. (W. D. Pa.), 195 F. Supp. 99, 102;

John Cola, Jr. v. Penn. Ry. Co. (W. D. Pa.), 213 F. Supp. 122, 123;

Marine Towing Co., Inc. v. Fairbanks, Morse & Co. (E. D. Pa.), 225 F. Supp. 467, 469;

Gray v. Alpert (W. D. Pa.), 220 F. Supp. 886, 890;

Berguido v. Eastern Airline, Inc. (E. D. Pa.), 35 F. R. D. 200;

Snyder v. Macaluso (W. D. Pa.), 204 F. Supp. 370.

In **Bennett v. D. C. Transit System, Inc. (C. A. D. C.), 298 F. 2d 325**, Judge Fahy, dissenting from the majority, followed the **Lind** rule, saying:

> I concur in reversing the judgment entered in favor of the Transit Company notwithstanding the verdict of the jury in favor of the plaintiff. I would not, however, grant a new trial but would direct reinstatement of the jury verdict and entry of judgment for the plaintiff. The crucial question was whether the jury would credit the testimony of the plaintiff and her small son as to the happening of the accident when they were unsuccessfully attempting to board a bus of the Company. This testimony in substance was that the door of the bus temporarily caught plaintiff's leg. The bus driver did not see the alleged accident, and neither he nor any passenger who remained on the bus reported it. Plaintiff, however, notified the Company the same day, and the matter was then investigated by the Company.
>
> The defense was an attack on the credibility of plaintiff and her child, so that the case posed a clas-

sical jury question, which the jury answered. It is in derogation of the jury function, as it seems to me, for the conclusion they reached, attributable to no error of law, not to be given effect. See Lind v. Schenley Industries, Inc., 278 F. 2d 79, 87-91 (3rd Cir., 1960), cert. denied 364 U. S. 835, 81 S. Ct. 78, 5 L. Ed. 2d 60, where following a thorough discussion, the opinion states in part:

> "But where no undesirable or pernicious element has occurred or been introduced into the trial and the trial judge nonetheless grants a new trial on the ground that the verdict was against the weight of the evidence, the trial judge in negating the jury's verdict has, to some extent at least, substituted his judgment of the facts and the credibility of the witnesses for that of the jury. Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts. It then becomes the duty of the appellate tribunal to exercise a closer degree of scrutiny and supervision than is the case where a new trial is granted because of some undesirable or pernicious influence obtruding into the trial. Such a close scrutiny is required in order to protect the litigants' right to jury trial."

278 F. 2d at 90. The court then pointed out that since the case turned upon credibility, an issue which was resolved by the jury, the grant of the new trial constituted an abuse of the court's "legal discretion," requiring reinstatement of the verdict of the jury.

Our case is even clearer than Lind, for here the learned trial judge thought plaintiff made no case for the jury. He accordingly granted judgment for the

> defendant, n. o. v. This court now holds there was a case for the jury; that is, that the evidence was sufficient to enable the jury to find for the plaintiff. No gaps need to be filled to make out a jury question which could be, as it was decided favorably to the plaintiff.

The majority of the Court of Appeals for the District of Columbia in the above case felt inclined to indulge every possible presumption that the trial judge had a valid reason for granting a new trial. They did not, however, affirm his action upon the ground that he was entitled to substitute his judgment as to the credibility of witnesses for the jury and grant a new trial on that ground.

There are cases in other circuits where the appellate court has refused to reverse a trial judge for granting a new trial where he has weighed the evidence and found that the weight of the evidence is against the verdict. If he declares that, without disclosing what the evidence is and without showing how he did the weighing, appellate courts have no way of determining whether there was an abuse of discretion without themselves weighing the evidence independently. This, of course, is not a function of an appellate court.

But, where, as here, the trial judge publishes a memorandum setting forth the grounds of his decision and showing minutely how he weighed the evidence and it is apparent from the face of his opinion that he acted without any sound reason, then the appellate court is not limited to examining the record to see if there is any substantial evidence that would have supported a contrary verdict of the jury and affirming the action on the trial judge for this reason. Where, as here, it is obvious from a mere reading of the trial judge's memorandum that there was conflict in the evidence, that the matter or issue in litigation was simple and easily to be comprehended by

any layman of average intelligence, and the judge states that he is substituting his own view of credibility for the judgment of the jury, then an appellate court can have no trouble declaring that the judge erred in matter of law and abused his discretion, which was a legal and not an arbitrary one.

FAILURE AND REFUSAL OF COURT OF APPEALS TO PASS ON THE QUESTIONS RAISED BY PETITIONER ON HER APPEAL.

These questions are set out in petitioner's petition at pages 22 to 28. Respondents' brief fails to show any good reason for the refusal of the Court of Appeals to pass on these questions. The Court of Appeals' reason is not sound. Petitioner filed in the Court of Appeals a petition to rehear, asserting:

> "Appellant says it was the duty of this Court to pass upon the other issues raised in her brief concerning the action of the trial judge in granting the new trial to the defendant insurance companies because they show clear errors of law which are reviewable on appeal from the granting of the new trial and were in no way disposed of by the review of the record made by the Court as the result of which it was concluded that the insurance companies had introduced 'substantial evidence in the record to the effect that the insured had been guilty of fraud and false swearing in the proof of loss and that he had not participated in procuring of the burning of the subject property.'"

The Court of Appeals denied the petition to rehear without deciding the questions.

It seems to petitioner that the affirmance of the action of the trial judge in granting a new trial on the ground that no abuse of discretion was shown **while refusing to**

even consider the grounds asserted as being the abuse of discretion and lack of power and jurisdiction and the other questions of law raised by petitioner in her brief on appeal is wholly without justification. It is about the same thing as depriving a litigant of his day in court.

Let us take up just one question raised by petitioner that was not decided by the Court of Appeals to show how the Court of Appeals has failed in the performance of its duty. Petitioner asserted that it affirmatively appears from the court's Memorandum that the new trial was granted solely because the court thought a different inference from conflicting evidence was more reasonable than the one the jury drew. Now, the Court of Appeals for the Sixth Circuit itself in **Werthan Bag Co. v. Agnew, 202 F. 2d 119, 122,** declared that the rule of the Tennessee state courts that the trial judge is a 13th juror does not apply in the Federal courts sitting in the state and said:

> "And since the credibility of witnesses is peculiarly for the jury it is an invasion of the jury's province to grant a new trial merely because the evidence was sharply in conflict."

Under this rule it is an abuse of the trial court's discretion to grant a new trial merely because the evidence was sharply in conflict and the court took a different view of credibility of the witnesses from that taken by the jury. Does the fact that there is substantial evidence which would have supported a verdict meeting the court's approval justify the court in granting a new trial? Clearly not. Does it justify the Court of Appeals in refusing to decide the issue whether the grant of a new trial was an invasion of the jury's province (and, therefore, an abuse of discretion) because his opinion on its fact shows that the evidence was in conflict and he differed with the jury on the credibility of the witnesses? If so, the rule is unenforcible. It means trial judges are not bound by it if they exercise discretion not to be.

We believe the Court can see why we complain of the refusal of the Court of Appeals to decide the issues raised by petitioner on her appeal. The other questions raised which were not passed on are equally good and strong and clear.

Justice is thwarted when courts will not permit litigants to present the cases or refuse to decide on the cases when they are properly presented.

Respectfully submitted,

FYKE FARMER,
1111 American Trust Building,
Nashville, Tennessee 37201,
Attorney for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 757.

HELEN CORINNE SCALES TRICE, Executrix,
Petitioner,
vs.
COMMERCIAL UNION ASSURANCE
COMPANY, LTD., et al.,
Respondents.

ADDITIONAL BRIEF ON BEHALF OF PETITIONER.

FYKE FARMER,
1111 American Trust Building,
Nashville, Tennessee 37201,
Attorney for Petitioner.

Ex Parte Law Printing Co., Inc., 424 W. Eighth Street. CHestnut 1-4417.

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ADDITIONAL BRIEF ON BEHALF OF PETITIONER.

When Associate Justice Potter Stewart was on the Court of Appeals for the Sixth Circuit, he was on a division of circuit court judges who decided the case of **The Sucher Packing Co. v. Manufacturers Casualty Insurance Company (C. A. 6th), 245 F. 2d 513.** The court in its opinion in that case, written by Judge Shackleford Miller, declared:

> "Upon examination of the record, it is clear that the verdict of the jury was justified by the evidence. The jury obviously refused to give any credence whatever to the testimony of William Harris, except where

it was not in dispute; and, as the trial court charged, the jury is the sole judge of the credibility of witnesses."

We believe that the foregoing was generally, if not universally, considered to be the correct rule of law in the Federal courts, until this case was decided. In **Moore's Federal Practice, Vol. 6, Sec. 59.08 (5), page 3818**, it is stated:

> "There are statements in the cases that, in ruling on the motion, the trial judge acts as a thirteenth juror. Properly understood and applied, no fault can be found with them for the judge does evaluate and weigh the evidence. But while he has a responsibility for the result no less than the jury, he should not set the verdict aside as against the weight of the evidence merely because, if he had acted as the trier of the fact, he would have reached a different result; and in that same sense he does not act as a thirteenth juror in approving or disapproving the verdict. And since the credibility of witnesses is peculiarly for the jury it is an invasion of the jury's province to grant a new trial merely because the evidence was sharply in conflict."

In the case at bar, the defendants had the burden of proving their defenses of false swearing in the proof of loss and intentional burning of the mill by the insured Joe W. Scales by a preponderance of the evidence. The trial judge correctly instructed the jury that they were the exclusive judges of the credibility of the witnesses. But, seven months after judgment had been entered on the verdict, the trial judge held that the jury were not the exclusive judges of the credibility of the witnesses, and that since they decided the credibility of the witnesses differently from the way he would have decided it, he set the verdict of the jury aside in order to put the case before another jury and give the defendants another chance.

This brings us to the decision of the Court of Appeals. A division of the court, with two district judges from the same state in which the trial judge sat, apparently forgetful that the burden of proof on the two issues of fraud and intentional burning was on the defendants to prove their defenses by a **preponderance** of the evidence, said it was enough to preclude them from disturbing the decision of the trial judge that they had examined the record and found substantial evidence that the insured was guilty of fraud and intentional burning of the mill. How may this be reconciled with the trial court's charge to the jury that, in order for them to find for the defendant on the two issues, they must find that to find the defendant had carried the burden of proving them by a **preponderance** of the evidence? Petitioner submits it cannot.

The jury were not instructed that they might find for the defendant if there was **some substantial** evidence that the insured was guilty of fraud and intentional burning. But, it was enough for the Court of Appeals to affirm the judge's action in setting aside the verdict that there was **some substantial** evidence on the two issues.

Manifestly, the Court of Appeals became confused. It confused the process of the appellate court in ruling on an appeal from a denial of a new trial motion asserting the verdict is against the weight of the evidence with an appeal from a grant of a new trial on that ground. If the trial judge denies the new trial motion, the appellate court limits its function to determining from an examination of the record whether the verdict was supported by substantial evidence. Such a case was **Grand Trunk Western Ry. Co. v. Westlie (C. A. 6th), 48 F. 2d 759.** Three of the greatest judges who ever sat on the Sixth Circuit Court of Appeals, Denison, Moorman and Hickenlooper, there said:

> "The contention that the verdicts are against the weight of the evidence cannot be considered, as this

court can go no further than determine whether there is **substantial evidence to support** them" (Emphasis added).

Cf. **Brown v. Poland (C. A. 10th), 325 F. 2d 985, 986.**

But an entirely different question is presented where the jury has returned a verdict against the side having the burden of proof on an issue and the judge sets the verdict aside as being against the weight of the evidence. In order to uphold the judge's exercise of discretion by an examination of the record, the appellate court must find as he did that the evidence overwhelmingly preponderates against the verdict. As the trial judge could not set the verdict aside merely because there was substantial evidence offered by the party having the burden of proof, neither can the court of appeals sustain his action by a mere finding from an examination of the evidence that the party obtaining the new trial offered some substantial evidence on issues as to which it would be entitled to a jury verdict only upon a preponderance of the evidence. This follows inevitably from the rule that it is an invasion of the jury's province to grant a new trial merely because the evidence was sharply in conflict.

The confusion and harm that will result from the decision of the Sixth Circuit Court of Appeals in the law books in **334 F. 2d 673** is incalculable. If it is allowed to stand, it will mean that there has been a break-down in our jury system. It will have to be corrected some day. In order to do justice to petitioner it should be corrected on her present application.

Respectfully submitted,

FYKE FARMER,
1111 American Trust Building,
Nashville, Tennessee 37201,
Attorney for Petitioner.

CORRECTIONS IN FORMER BRIEFS.

Petitioner's attorney regrets the necessity of asking that the following corrections be made in briefs heretofore filed:

Supplemental and Reply Brief

page 28—second line from bottom of page "COUNSEL ARE" instead of "COUNSEL IS"

page 40—next to last line in quotation should read: "that he had participated in procuring of the"—omit word "not"

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page 3—fourth line from bottom of page insert "not" so that line reads "the Court of Appeals gave no good or sufficient reason for not passing on"